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Supreme Court, U.S.
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No. - .

In the
Supreme Court of the United States.

OCTOBER TERM, 1990.

BOSTON TEACHERS UNION LOCAL 66,
PETITIONER,

v.

TALLULAH MORGAN, ET AL.,
PLAINTIFFS-RESPONDENTS,
AND
DANIEL R. BURKE, ET AL.,
DEFENDANTS-RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI.

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May 21, 1991

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QUESTIONS PRESENTED

Whether the Court of Appeals' affirmance of a final judgment requiring a school board to "achieve and maintain" a faculty consisting of 25% black and 10% other minority teachers, and overriding the seniority rights of teachers under petitioner's collective bargaining agreement with the school board until such time as a projected seniority layoff will leave those same percentages intact, exceeds the authority of a federal court in a school desegregation case.

LIST OF PARTIES

The parties to the proceedings below were the Petitioner-Intervenor, Boston Teachers Union, Local 66, AFT, AFL-CIO, Plaintiffs-Respondents, Tallulah Morgan, et al., as well as, Defendants-Respondents, Daniel R. Burke, et al. (as they comprise the School Committee of the City of Boston).

Additional intervenor parties to the proceedings below were Concerned Black Educators of Boston, El Comite de Padres and the Board of Education for the Commonwealth of Massachusetts.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI.

The Petitioner, Boston Teachers Union, Local 66, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered in the above-entitled proceeding on February 21, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals from the First Circuit is reported at 926 F.2d 86, and is reprinted in the appendix hereto, p. 1a, *infra*.

The final judgment and memorandum of the United States District Court for the District of Massachusetts (Garrity, J.), unreported, is reprinted in the appendix, hereto, p. 15a, *infra*.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C., Sections 1343(3) and 1343(4), the Plaintiff brought this suit in the United States District Court for the District of Massachusetts.

On petitioner's appeal, the Court of Appeals for the First Circuit on February 21, 1991 entered a judgment amending the District Court's final judgment by deleting the words "or more" following "3%", and affirmed the judgment as amended. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit for all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

§ 2000d. Prohibition against exclusion from participation in denial of benefits of, and discrimination under Federally assisted programs on ground of race, color, or national origin.

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Thirteenth Amendment to the United States Constitution.

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Fourteenth Amendment to the United States Constitution.

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of

the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is an appeal from a final judgment of the United States District Court for the District of Massachusetts entered May 31, 1990, and affirmed by the First Circuit Court of Appeals on February 21, 1991, requiring the School Committee of the City of Boston ("the School Committee") to 'achieve and maintain' a faculty comprised of 25% black and 10% other minority teachers in its public schools and overriding for the foreseeable future the seniority provisions of the petitioner Boston Teachers Union's collective bargaining agreement in the context of reductions in force (A. 15a).

The suit was commenced in March 1972 by certain black children attending the Boston public schools and their parents against the School Committee and its individual members, the Superintendent of Schools (collectively, "the school defendants"), the Board of Education of the Commonwealth of Massachusetts and its individual members ("the State Board"), and the Massachusetts Commissioner of Education. The plaintiffs [1] "sought declaratory and injunctive relief, alleging that various actions of the City defendants . . . denied black children both the equal protection of the laws and equality of educational

[1] The named plaintiffs were certified as proper representatives of a class of students and parents and the case thus proceeded as a class action under Rule 23, Federal Rules of Civil Procedure. *Morgan* v. *Kerrigan*, 509 F.2d 580, 582 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

opportunity, in violation of the Thirteenth and Fourteenth Amendments and federal civil rights statutes." *Morgan* v. *Kerrigan*, 509 F.2d 580, 582-583 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). In its original decision on liability, the District Court described the plaintiffs' claim pertaining to the faculty and staff of the City's schools as follows:

> Plaintiffs' principal claim involving faculty and staff is that the defendants have knowingly pursued policies resulting in racial segregation of teachers and administrative personnel, thereby reinforcing the racial identifiability of schools and increasing the racial segregation of students.

Morgan v. *Hennigan*, 379 F. Supp. 410, 456 (D.C. Mass. 1974).

The court further noted that plaintiffs claimed that the school defendants had intentionally pursued a policy of placing lower paid and less credentialed teachers in schools where it had concentrated minority students and had discriminated on the basis of race in recruiting, hiring and promoting its staff. *Id.* After extensive hearings, the District Court found these claims proven and, on appeal, the Court of Appeals affirmed:

> The discriminatory hiring practices, segregative assignment and transfer policies, and the promotion system which perpetuated in administrative positions the effects of discriminatory hiring, have further combined to buttress the segregated nature of the school system. Their cumulative effect was to isolate black students, black teachers and black administrators in a limited number of schools, thereby denying to those students the equal educational opportunity to which they are constitutionally entitled.

> *Swann* v. *Charlotte-Mecklenburg Board of Education, supra*. Faculty segregation, which is uniquely amenable to the control of school authorities, *Kelly* v. *Guinn*, 456 F.2d 100, 107 (9th Cir. 1972), *cert. denied*, 413 U.S. 919, 93 S.Ct. 3048, 37 L.Ed.2d 1041 (1973), is a significant element in a racially discriminatory system which must be ". . . eliminated root and branch". *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 438, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).
>
> Moreover, as the district court properly found, the result of defendants' policies as to transfer, assignment, and placement of provisional teachers was to allocate to the schools attended by most black children the least experienced and least credentialed teachers, and to cause a rate of faculty turnover at predominantly black schools far higher than that at white schools. We affirm the district court's conclusion that these policies operated to deny to plaintiffs the equal education to which they are entitled.

Morgan v. *Kerrigan*, 509 F.2d at 597-598 (1st Cir. 1974).

The Boston Teachers Union Local 66, AFT, AFL-CIO ("BTU") was granted permission to intervene for the purpose of addressing faculty and staff issues, *Morgan* v. *Kerrigan*, 509 F.2d 599, 600 (1st Cir. 1975), and over the next decade, the District Court embarked upon its remedial efforts to dismantle the dual school system which it found had been created as a result of the School Department's unlawful conduct.

The numerous remedial orders entered by the District Court with this end in mind are set forth in *Morgan* v. *Nucci*, 831 F.2d 313 (1st Cir. 1987). In the particular area of faculty and staff, the District Court entered interim orders governing teacher transfers, *see Morgan* v. *Kerrigan*, 509 F.2d 599, 600

(1st Cir. 1975), requiring one-for-one hiring until black faculty reached a targeted goal of 20% and the implementation of a recruitment program designed to achieve a black faculty of 25%. *Morgan* v. *Kerrigan*, 388 F. Supp. 581 (D.C. Mass. 1975), *aff'd*, 530 F.2d 431 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976).

In 1978, the District Court, prompted by the school defendants' non-compliance with its orders, directed that they increase the percentage of black faculty by 1½% annually until blacks constituted 25% of the faculty city-wide, an obligation which remained in place until 1981, when the court suspended the directive in the context of layoffs impending due to a budgetary crises and ordered that layoffs be conducted without regard to contractual seniority so as to preserve then existing ratios of black faculty. See *Morgan* v. *O'Bryant*, 671 F.2d 23 (1st Cir. 1982).

From 1982 to September 3, 1985, the District Court gradually disengaged from its supervision of all aspects of the public schools, terminating "roughly half of its original remedial orders in discrete areas of school operations". *Morgan* v. *Nucci*, 831 F.2d 313, 316 (1st Cir. 1987).[2]

On September 3, 1985, the District Court signalled its further disengagement by removing the case from its active docket and entering 'final orders' governing vocational and occupational education, school facilities, student assignments, faculty and staff desegregation, and student/parent organizations, all areas where the court felt the continuing need of judicial control (A. 39a-42a). In the area of faculty and staff desegregation, Paragraph 5 of the final orders required the school defendants to:

[2] The District Court terminated orders pertaining to bilingual education, school safety and security, student discipline, special education and institutional pairing. 831 F.2d at 316. Additionally, it transferred primary responsibility for monitoring on-going compliance with its outstanding orders to the State Board and directed the State Board to file periodic reports detailing the school defendants' efforts to eradicate the vestiges of discrimination. *Id. citing Morgan* v. *McDonough*, 554 F. Supp. 169, 171 (D.C. Mass. 1982).

> . . . achieve and maintain a desegregated faculty and administrative staff which are each comprised of not less than 25% blacks and 10% other minorities, by increasing the proportions of black faculty and administrative staff at a rate of not less than one-half percent annually and the proportion of other minority faculty at the rate of not less than one-quarter percent annually, and of other minority administrative staff in accordance with the parties' agreement for a one out of three hiring ratio, approved and ordered by the court on November 26, 1984 and July 5, 1985.

Morgan v. *Nucci*, 620 F. Supp. 214, 216 (D.C. Mass. 1985).

Although the First Circuit Court of Appeals eventually vacated the District Court's final order governing student assignments on the grounds that, in that area of its operations, the school defendants had attained unitary status, it rejected petitioner's challenges to Paragraph 5 and affirmed the faculty and staff order on appeal. *Morgan* v. *Nucci, supra,* 831 F.2d at 328-332.

In February 1990, sensing the possibility of layoffs for the 1990-1991 school year, the BTU asked the District Court to clarify whether an order entered in 1981, insulating the faculty at South Boston High School from layoffs, had been impliedly vacated in 1985 with the court's entry of Final Orders. During the course of a hearing conducted on the BTU's motion on April 18, 1990, the District Court announced from the bench that it was contemplating the entry of a final judgment containing only two paragraphs; one addressing the department of implementation and the other, consisting of a permanent injunction. The judgment, unlike its final orders, the District Court indicated, would contain no provisions addressing facilities, faculty desegregation, student assignments, parent organizations, or its previously entered 90 day modification process.

The following day the district court circulated a draft final judgment in that form, and, in an accompanying procedural order scheduling a hearing thereon for May 21, 1990, invited the parties to file comments, objections and proposed alternatives before that date (A. 43a-45a). At the conclusion of the hearing and after hearing from the parties, the court declared that the school system had not achieved unitary status and that "a good deal remains to be done" (A. 84a). Accordingly, it entered the following final judgment on May 31, 1990, which, in Paragraph 3, orders that the school defendants:

> shall achieve and maintain a desegregated faculty and administrative staff (hereinafter "staff"), and a desegregated faculty at each of the three examination schools, comprised of not less than 25% blacks and 10% other minorities by increasing, if said percentage goals be not achieved or not maintained, the proportions of black faculty and staff at the rate of not less than one-half percent annually and of other minority faculty and staff at the rate of not less than one-quarter percent annually and, notwithstanding applicable collective 'bargaining agreements, shall conduct any reduction in force (RIF) of either faculty or staff in such a manner as to preserve after such RIF substantially the same racial/ethnic proportions of faculty and staff as existed immediately before it; provided that the orders in this paragraph shall expire when black and other minority faculty and staff shall have attained seniority to such an extent that, were a RIF to occur based upon the seniority provisions of applicable collective bargaining agreements reducing faculty and staff by 3% or more, the racial/ethnic proportions of faculty and staff after such a RIF, would in the written opinion of the Superinten-

dent of Schools, be substantially the same as those existing before it.

(A. 17a.)

Petitioner appealed from the final judgment dated May 31, 1990 to the Court of Appeals for the First Circuit (A. 98a). Oral argument was heard on December 3, 1990 and the Court of Appeals rendered an opinion on February 21, 1991, amending and affirming the decision of the District Court Judge. The First Circuit deleted the words "or more" following the word "3%" in Paragraph 3, and affirmed the judgment as amended (A. 12a).

Petitioner, BTU, now respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered on February 21, 1991.

REASONS FOR GRANTING THE WRIT

Affirmance of Paragraph Three (3) of the Final Judgment by the Court of Appeals empowers local school authorities to effect race conscious personnel measurers, including layoffs in derogation of Petitioner's seniority clause, even after authorities are no longer operating a dual school system and have eliminated its vestiges.

The Court of Appeals for the First Circuit, in contrast to the precedents of this Court, as well as other circuit courts of appeal, has significantly expanded the scope of remedial authority possessed by federal courts in their efforts to dismantle a segregated public school system. In this regard, while petitioner has consistently acknowledged the unquestionably broad authority with which federal courts are invested in eliminating segregation "root and branch", *Green* v. *New Kent*

County School Board, 391 U.S. 430, 437-438 (1968), that authority is not without limits. This Court has established firmly the proposition a federal district court's remedial power extends no further than the scope of the constitutional violation found. *Columbus Board of Education* v. *Penick*, 443 U.S. 449, 465 (1979); *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 420 (1977); *Milliken* v. *Bradley*, 418 U.S. 717, 744 (1974); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 28 (1971). The implementation of race conscious remedies, as a means of eradicating the vestiges of past discrimination, is permissible for the performance only of that function. *City of Richmond* v. *J.A. Croson, Co.*, 109 S.Ct. 706, 738 (1989) (Scalia, J., concurring). The use of racial classifications in circumstances where there no longer exists a condition offending against the Constitution is as violative of the Fourteenth Amendment as the state-sponsored segregation giving rise to judicial intervention in the first instance. *Id.* at 735.

This Court has recently reminded the nation that federal judicial power in this context is inherently circumscribed:

> "Federal court decrees must directly address and relate to the constitutional violation itself. Because of this inherent limitation of federal judicial authority, federal court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation."

Board of Education Oklahoma City Public Schools v. *Dowell*, 111 S.Ct. 630, 637 (1991) quoting *Milliken* v. *Bradley*, 433 U.S. 267, 282 (1977).

In the last quarter century, this Court has carefully scrutinized the implementation of race conscious remedies by the federal courts to ensure their continuing fidelity to these principles.

In addition to requiring that a trial court's remedy relate to "the condition that offends the constitution", *Swann* v. *Charlotte-Mecklenburg Board of Education, supra*, 402 U.S. at 16, this court has emphasized the importance of ending judicial intervention at that point in time where the school system may be said to have brought itself into compliance with the constitutional guarantee of equal protection. *Board of Education of Oklahoma City Public Schools* v. *Dowell, supra*, 111 S.Ct. at 637 ("The legal justification for displacement of local authority by an injunctive decree in a school desegregation case is a violation of the Constitution by local authorities"). Furthermore, the only vestiges of discrimination which a federal court may address through the fashioning and implementation of racial remedies are those which are properly characterized as state-imposed. *Swann* v. *Charlotte-Mecklenburg Board of Education, supra*, 402 U.S. at 13; *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 434 (1976); *Board of Education of Oklahoma City Public Schools* v. *Dowell, supra*, 111 S.Ct. at 638 & n.2.

The opinion of the First Circuit Court of Appeals barely acknowledges the undisputed fact that in virtually every area of operations, the Boston Public Schools today bear little resemblance to the dual school system operating at the inception of this action in 1972. Confirming this fact, the District Court has gradually disengaged from active supervision of most aspects of the public schools. By September 3, 1985, the District Court had terminated its jurisdiction in over half of its original remedial orders.[3] By the entry of final judgment on May 31, 1990, the court terminated its jurisdiction further in areas of

[3] By orders dated October 31, 1984, May 17, 1985 and August 8, 1985, entered after notice and hearing, jurisdiction ended with respect to (i) special education, (ii) pairings of colleges, universities and business institutions with particular schools and community districts, (iii) school safety and security, (iv) student discipline, (v) bilingual education, and (vi) student transportation. *Morgan* v. *Nucci*, 620 F.Supp. 214, 218 (D. Mass. 1985).

vocational and occupational education, as well as parent and student organizations (A. 15a). In fact, with the entry of Final Judgment of May 31, 1990, the District Court left but three areas of concern under its remedial wing: (1) a Unified Facilities Plan; (2) the Department of Implementation; and (3) Faculty and Staff. With respect to the Unified Facilities Plan, the Final Judgment merely required the eventual completion of the Unified Facilities Plan orders, entered on March 25, 1985. With respect to the Department of Implementation, the Final Judgment mandates only a continued use of the Department to monitor assignments and transportation.

However, with respect to its last remaining area of jurisdiction, faculty and staff, the District Court has maintained and expanded its jurisdiction, in essence redefining the concept of unitariness with respect to faculty and staff that the parties have come to understand over the last six years. Since September 3, 1985, up through May 30, 1991, the District Court had envisioned the attainment of unitary status in the area of faculty and staff desegregation to be the achievement of a faculty comprised of 25% black and 10% other minority teachers. In fact, the First Circuit affirmed this understanding in the context of rejecting Petitioner's appeal from the district court's 'Final Orders' of September 1985:

> "This court has stated, however, that the 25 percent black faculty ratio 'provides a built-in terminus for court responsibility.' *Morgan* v. *Kerrigan*, 530 F.2d 431, 434 (1st Cir.), *cert. denied*, 426 U.S. 935, 96 S.Ct. 2649, 40 L.Ed.2d 386 (1976). The district court's final orders must be read in light of this statement. Once these goals have been adequately reached, the district court's role in the school's personnel policies will end, and we are confident the court will recognize its responsibility to terminate the injunction."

Morgan v. *Nucci*, 831 F.2d at 329.

Petitioner acknowledges that when the May 31, 1990 final judgment was appealed to the Circuit Court of Appeals, the school system remained 1.16% short of the required complement of black teachers. The Court of Appeals rejected (petitioner asserts, erroneously) the union's argument that this fact alone did not justify continued federal supervision in the area of faculty and staff. Compare, *Oliver* v. *Kalamazoo Board of Education*, 706 F.2d 757, 762 (6th Cir. 1983); *United States* v. *Wilcox County Board of Education*, 494 F.2d 575, 579 n.2 (5th Cir.), *cert. denied*, 419 U.S. 1031 (1974). But whether or not it rightly rejected Petitioner's claim that a faculty of 23.86% black and 10.11% other minority teachers was no less unitary than one whose complement of black teachers was 25% and 10.11% other minority, the Court of Appeals endorsed a clear departure from its earlier observation by refusing to acknowledge the "built-in terminus point" to the district court's injunction.

The Circuit Court of Appeals had clearly recognized in that portion of its 1987 opinion involving the district court's student assignment plan that the latter's remedial authority could not extend beyond unitariness. *Morgan* v. *Nucci*, 831 F.2d 313, 318 (1st Cir. 1987) ("the one thing certain about unitariness is its consequences: the mandatory devolution of power to local authorities"). Now, with its affirmance of the May 31, 1991 final judgment, the circuit court has endorsed an alteration of that previously acknowledged built-in terminus point for the lower court's injunction from the attainment of the required mathematical ratios to their *maintenance* thereafter on a continuing basis, until a hypothetical 3% faculty layoff by seniority leaves the percentages intact.

Moreover, while it may be possible in a purely abstract sense to envision a point in time when the injunction incorporated into Paragraph Three (3) of the district court's final judgment will terminate, the terminus point is, for all practical purposes, illusory.

As detailed above, the district court's final judgment calls for the School Department to achieve the goal of a faculty and staff comprised of no less than 25% black and 10% other minority employees, and to "maintain" said percentages once attained. The district court further affixed to this injunction a terminus point based entirely upon a hypothetical reduction in force. The order, as amended, would terminate according to its own terms when the seniority status of black and minority teachers reaches a point where an imaginary 3% layoff would, in the written opinion of the superintendent of schools, leave substantially intact the pre-layoff percentages of black and other minority educators (A. 17a). The hypothetical layoff scenario is to be conducted "based upon the seniority provisions of applicable collective bargaining agreements" (A. 17a). However, if one examines the seniority provisions of the parties collective bargaining agreement, it becomes clear that it is impossible to envision the practical effect of a hypothetical layoff. This is so because, at any given time, a supposed 3% layoff could have any one of many different effects on the percentage of minority faculty, depending on factors such as the educational program areas targeted for layoffs, the numbers of black an other minority teachers concentrated within those program areas and the educational needs of the school system. The district court articulated no guidlines to determine how such a layoff might be projected.

The collective bargaining agreement between Petitioner and the School Committee calls for the assignment of teachers to at least one primary program area, of which there are 96 listed in the agreement under four main areas of instruction: regular, occupational (or "vocational"), bilingual and special education[4] (A. 31a-38a). Teachers are ranked by seniority in their

[4] There are 29 program areas listed in the agreement for teachers of regular education, 21 program areas for teachers of bilingual education, 33 program areas for teachers of occupational education and 13 program areas for teachers of special education (A. 31a-38a).

respective program areas and, if layoffs become necessary, the agreement requires that they be conducted, by program area, in reverse seniority order (A. 26a). The racial composition of the faculty and staff varies from one program area to another and while the record does not reveal the exact distribution of faculty among all of the program areas, it does show that black faculty have concentrated more heavily in regular and vocational education positions whereas other minority teachers make up more than 50% of all bilingual education teachers.[5] The distribution of faculty in these proportions violates no outstanding court order.

The district court's final judgment makes no mention of which program areas or major instructional areas are to be targeted for its hypothetical layoff scenario, nor does it specify that the 3% layoff should be hypothesized on a random basis. In either case, however, it is plain that until the population of black and other minority teachers in the Boston Public Schools becomes distributed *across* program areas in numbers that approximate their percentages system wide in the work force, and further, become distributed *within* individual program area seniority lists in such a way that every fourth teacher is black and every tenth teacher is an other minority, a random seniority layoff will never leave pre-existing racial percentages intact. Petitioner is thus unable to envision any practical layoff scenario that would trigger termination of the order. In short, until the system achieves a mathematical symmetry in the dis-

[5] The March 15, 1990 court report reflects the following distribution of black and other minority teachers in regular, vocational, special and bilingual education.

	Regular	Vocational	Special	Bilingual
Black	26.14%	32%	19.41%	20.02%
Other Minority	2.96%	8%	8.21%	52.32%

(A. 107a.)

tribution of black and other minority teachers, both across and within program areas, a seniority-based 3% layoff virtually assures that the racial percentages of black and other minority teachers will not remain intact, leaving the court's injunction fully operative, in perpetuity, regardless of whether the school system is otherwise being operated in full compliance with the Constitution, a point brushed aside by the Court of Appeals without any real analysis (A. 15a). The illusory nature of the terminus point for the court's order ensures that it will far outlast any lingering vestige of discrimination in the Boston Public School System.

Beyond the fact that it is virtually impossible to ascertain the injunction's terminus point, affirmance of the district court's final judgment raises the further question whether the order represents an impermissible effort to construct permanent racial ratios, a concept rejected by this Court in *Milliken* v. *Bradley*, 433 U.S. 267, 280 n.14 (1977) ("an order contemplating the 'substantive constitutional right [to a] particular degree of racial balance or mixing' is therefore infirm as a matter of law."). Paragraph Three (3) of the final judgment purports to be self-limiting through its command that the achievement and maintenance feature of faculty racial percentages shall expire when a seniority layoff will leave those percentages intact, but this appears to be little more than a different way of requiring that a faculty have 25% black and 10% other minority teachers regardless of the mechanism relied on in reducing the overall size of the work force.

The district court's decision to override for the indefinite future the seniority rights of petitioner's bargaining unit by requiring that any layoffs conducted be done on a race conscious basis until a seniority layoff will leave the faculty's racial percentages intact also raises the question whether adoption of that measure in its final judgment was beyond the court's remedial powers. In this regard, while petitioner has

repeatedly acknowledged the district court's broad authority to root out the vestiges of intentional state-imposed discrimination, and recognizes that intentionally discriminatory hiring practices by the school committee underline the judgment, *See Morgan* v. *Hennigan*, 379 F.Supp. 410, 463-466 (D.C. Mass. 1974) this Court has indicated that the official adoption of race conscious measures must be strictly scrutinized to ensure that they rest upon compelling governmental interests and remain narrowly tailored to a remedial goal. *City of Richmond* v. *J.A. Croson Co.*, 109 S.Ct. 706, 721 (1989); *Wygant* v. *Jackson Board of Education*, 476 U.S. 267, 273-274 (1978).

At the time the district court was considering its adoption of the final judgment in this case, the Boston School Committee, driven by budgetary constraints, was preparing to layoff 250-300 teachers (A. 76a). The district court's assumption, adopted without explication by the Court of Appeals, appears to have been that the Boston Public Schools, but for the School Committee's intentionally discriminatory turning practices detailed in 379 F.Supp. at 456-466, would have attained a faculty whose racial composition would have approximated those contained in its final judgment, together with seniority sufficient to withstand layoffs without significantly altering the faculty's racial composition. The district court thus adopted the plaintiff's observation at the hearing on the final judgment that seniority tended to "skew" the results of a budgetarily motivated layoff by disproportionately impacting blacks and other minorities (A. 79a).

Beyond the district court's adoption of the system-wide percentages themselves, there is nothing in the voluminous record of this lengthy school desegregation case to support conclusions about the numbers of black and other minority faculty who would have likely been employees in the school system today but for the School Committee's discrimination conduct, how those faculty have been distributed across program areas and

what their seniority ranking would have been. So far as the record is concerned, there is, for example, no assurance that other minority teachers would not in any event have become heavily concentrated in bilingual education program areas such that a seniority layoff resulting from cuts in bilingual education would disproportionately impact that teacher population whether or not the system had once been segregated. There has similarly been no finding in the case that petitioner's seniority clause — negotiated long after the district court's original liability decision — is the product of intentional segregation by the School Committee. In the absence of findings on these issues, there is no perceptible basis for conducting that petitioner's seniority clause is itself a vestige of the dual school system or a feature which serves to "skew" layoffs to the detriment of the plaintiff class.

On the contrary, what little data that was presented to the district court in connection with its hearing to decide upon the form of a final judgment tended to prove that the impact of petitioner's seniority clause on the percentages of 25 and 10 would have been very moderate in the context of the particular layoff then under consideration by the Boston School Committee, particularly with respect to other minority teachers (A. 97a). Conversely, the decision to override seniority shifted the entire burden of the layoff to senior white teachers. It cannot be contended that overriding the seniority rights of innocent third parties by indefinitely forcing them to bear the entire burden of job layoffs for the foreseeable future is remedial or a "narrowly tailored" device where there is no record support for the conclusion that seniority perpetuates prior discrimination.

Nor did the Circuit Court recognize that less intrusive means were readily available to achieve the lower court's goals, even allowing for the argument that achievement of the faculty racial percentages is not tantamount to unitariness so as to bring about

an end to the district court's continued involvement in school personnel matters. In this regard, no consideration was granted to the notion that if a budgetarily driven layoff by seniority would result in a reduction of the ranks of black and other minority teachers below the mandated percentages of 25 and 10, ordering the School Committee to recall and reinstate those individuals before employing newly-hired teachers would assure that the reduction be only temporary in nature. The court could not have been unaware of this alternative. *See* e.g., *Morgan* v. *Nucci*, 831 F.2d 313, 328 (1st Cir. 1987) *citing Morgan* v. *Nucci*, 620 F.Supp. 214, 227 (D.C. Mass. 1985).

The Court of Appeals affirmance of a final judgment that requires local school officials to continue race conscious personnel measures even after the percentage goals of the remedial order have been achieved creates a legal principle that also appears to create a conflict among the circuit courts of appeal. As detailed above, achieving the percentage goals of 25% black and 10% other minority teachers as required by the court had heretofore been recognized as the attainment of unitary status for the school system, at least within the faculty and staff subset of the case. *See* e.g. *Morgan* v. *Nucci*, 831 F.2d 313, 319 & n.5, 329 & n.25 (1st Cir. 1987). Petitioner is unaware of authority elsewhere among the circuit courts of appeal that would allow a federal court to continue requiring compliance with its orders once unitary status is achieved.

The First Circuit cited authority from the Fifth and Eleventh Circuits suggesting that a court may "retain jurisdiction after technical compliance with orders has been reached" (A. 12a). Simply stated, neither the authority presented from these circuits, nor the authority from any remaining circuits stands for the proposition that a federal court may maintain jurisdiction over a desegregated school system, once unitariness is achieved. No circuit court of appeal, other than the First Circuit, has so expanded the scope of judicial remedial authority.

The Court of Appeals relied upon *Quarles* v. *Oxford Mun. Separate School District*, 868 F.2d 750 (5th Cir. 1989) and *Ross* v. *Houston Independent School District*, 699 F.2d 218 (5th Cir. 1983). The *Quarles* decision does not authorize a post-desegregation "limited monitoring" by the federal court. In fact, it concludes quite the opposite. The underlying district court activity which gave rise to the *Quarles* opinion was a 1987 motion to dismiss the longstanding segregation order by the School Department. At that time, and for the first time, the district court concluded that "Oxford achieved unitary status and was entitled to a dismisal of the action." *Quarles* v. *Oxford Mun. Separate School District, supra*, 868 F.2d at 752. The Fifth Circuit upheld this decision, and affirmed the dismissal of the desegregation orders. *Id.* In this light, it would be erroneous to interpret the *Quarles* decision as authority for the post-unitariness judicial supervision of the school system.

The First Circuit also cites *Ross* v. *Houston Independent School District*, 699 F.2d 218 (5th Cir. 1983), referring to language where "[H]e [the district judge] retained jurisdiction over the action for three years." 699 F.2d at 227. However, the ensuing paragraph clarified that the Fifth Circuit speaks of a pre-unitariness retention of jurisdiction, and not a post-unitariness supervision. *Id.* The Fifth Circuit has ruled, consistent with *Spangler*, that unitariness ends judicial power:

> "We also are unconvinced that the end of judicial superintendence that accompanies unitary status means only that a superintending injunction and a pending suit are absent; rather, we are convinced that it must also be accompanied by a release of a unitary district from the burden of proving that its decisions are free of segregative purpose."

United States v. *Overton*, 834 F.2d 1171, 1175 (5th Cir. 1987).

The First Circuit's reliance on Eleventh Circuit authority is as puzzling as its reliance on the above Fifth Circuit decisions. The case of *Pitts* v. *Freeman*, 887 F.2d 1438, 1446 & n.9 (11th Cir. 1989) also refers to a "period of not less than three years" for judicial supervision of a segregated school system. The Court in *Pitts*, like the court in *Quarles*, was referring to a period of supervision ultimately leading up to unitary status, but not beyond. 887 F.2d at 1446.

The First Circuit did not appear to consider authorities from the remaining circuits, including the Fourth Circuit Court of Appeals where the court has likewise had considerable experience in reviewing issues arising from desegregation litigation. *Riddick by Riddick* v. *School Board of Norfolk*, 784 F.2d 521, 535 (4th Cir. 1986); *Vaughns* v. *Board of Education of Prince George's County*, 758 F.2d 983, 988 (4th Cir. 1985). In *Vaughns* the court addressed federal judicial authority to remedy resegregation within a school district before the attainment of unitariness. In that case, the plaintiff had moved to reopen the case in the district court claiming violations of outstanding orders and that the local board continued to maintain a segregated school district. The Fourth Circuit's decision upholding the district court's retention of jurisdiction emphasized the distinction between judicial authority to reopen a case and grant relief before unitariness is achieved and the limits posed by unitariness:

> "A district court's jurisdiction to grant further relief in school desegregation cases is not perpetual, however. Once a school system has achieved unitary status, a court may not order further relief to counteract resegregation that does not result from the school system's intentionally discriminatory acts."

Id. at 988.

Furthermore, once a school system is found to have been unitary, the burden of proving the discriminatory intent of resegregation attaches to the plaintiff. *Riddick by Riddick, supra,* 784 F.2d at 539. The *Riddick* decision makes clear the distinction between the school board's burden of proving that unitariness has been achieved, and the plaintiff's burden of showing that any resegregation was an intended result of the school defendants' actions.

In what is arguably a more closely analogous context, the Sixth Circuit in *Oliver* v. *Kalamazoo Board of Education,* 706 F.2d 757 (6th Cir. 1983), addressed a desegregation court's ability to nullify contractual seniority rights as part of a remedial order by overruling the district court's decision that seniority rights may be overriden when it is "reasonable" in pursuit of desegregation goals. Given that there is no constitutional right to attendance at "a school with a teaching staff of any particular racial composition" 706 F.2d at 762, the court held that "reasonableness" was not the standard:

> "[T]his court has stated that there must be a determination that 'it was necessary to vindicate plaintiff's constitutional rights, to hold such contract and statutory rights of the union to be unenforceable.'"

706 F.2d at 764 quoting *Brown* v. *Neeb,* 644 F.2d 551, 556 (6th Cir. 1981).

The Sixth Circuit's observation in *Oliver* was made in the context of a discussion of the affirmative findings a trial court must make before fashioning a remedy that trammels the rights of third parties and is reflective of the general principal that where unitariness has been achieved, or more narrowly tailored measures are available, overriding contractual seniority is inappropriate. Here, the standards for measuring unitariness in the faculty and staff subset of the case had from its inception

been deemed the school committee's attainment of the court mandated ratios of 25% black and 10% other minority teachers. *Morgan* v. *Nucci*, 831 F.2d 313, 329 (1st Cir. 1987). The Court of Appeals opinion now brushes aside its own clear acknowledgement of that fact in holding that the district court was free to order the school committee to maintain those percentages even after attainment of the heretofore established criterion for assessing unitariness and to disregard seniority in future layoffs even if those percentages have been maintained for several years. This assures that the Boston School Committee will remain free to utilize race as the determinative criterion in layoffs apart from its achievement of maximum practicable desegregation.

Finally, the Tenth Circuit, which provides recent authority on the extent of federal judicial power in the school desegregation context, adheres to this Court's rule in *Milliken II* restricting the scope of remedial injunctions to the breath of the constitutional violation proven. *Keyes* v. *School District No. 1, Denver, Colorado*, 895 F.2d 659, 665 (10th Cir. 1990). *Keyes* demonstrates fidelity to the general principle that attainment of desegregation represents a terminus point for federal court intervention in the affairs of local school boards. To the extent the First Circuit now permits the continuation of race conscious personnel measures in derogation of seniority beyond the point where the Boston School Committee achieves a faculty of 25% black and 10% other minority teachers, its affirmance of the district court expands judicial power in an way that conflicts with other circuit courts of appeal.

CONCLUSION

For all of the above reasons, petitioner respectfully requests this court to grant its petition for certiorari.

Respectfully submitted,

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May 21, 1991

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APPENDIX A

United States Court of Appeals

For the First Circuit

No. 90-1614

TALLULAH MORGAN, ET AL.,
Plaintiffs, Appellees,

v.

DANIEL R. BURKE, ET AL.,
Defendants, Appellees.

BOSTON TEACHERS UNION LOCAL 66,
Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. W. ARTHUR GARRITY, JR., *Senior District Judge*]

Before
BREYER, *Chief Judge*,
ALDRICH and COFFIN, *Senior Circuit Judges*.

Matthew E. Dwyer with whom *Grady and Dwyer* was on brief for appellant.

Robert Pressman with whom *Thomas I. Atkins* was on brief for plaintiffs-appellees.

Henry C. Dinger with whom *Marshall Simonds, Deborah J. Gresco,* and *Goodwin, Procter & Hoar* were on brief for defendants-appellees.

Caroline B. Playter with whom *Kenneth Kimerling, National Lawyers Guild, Kehoe, Doyle, Playter & Novick,* and *Puerto Rican Legal Defense Fund, Inc.* were on brief for El Comite de Padres.

Judy L. Newman with whom *Nancy Gertner,* and *Dwyer, Collora & Gertner* were on brief for Concerned Black Educators of Boston.

Robert H. Blumenthal, Special Assistant Attorney General, with whom *Carmen I. Rodriguez,* Assistant Attorney General, was on brief for the Commonwealth of Massachusetts.

February 21, 1991

COFFIN, *Senior Circuit Judge.* After nearly two decades of litigation aimed at desegregating the Boston public school system, this appeal by Boston Teachers Union Local 66 (BTU) challenges certain features of a "Final Judgment" entered by the district court on May 31, 1990.

The challenges are confined to the area of faculty and staff desegregation and present three issues: (1) whether, despite some shortfalls from earlier established goals, unitary status has been achieved in the hiring of faculty and administrative staff; (2) whether the court's prescription for determining the end of judicial involvement in faculty and staff hiring and layoffs "constitutes an impermissible permanent order;" and (3) whether, even if overall unitary status has not been achieved for faculty and staff, the court should have declared that partial unitariness had been achieved insofar as "other minority" (non-black) faculty and staff are concerned.

We affirm the Final Judgment, as amended by the deletion of two words which unnecessarily inject uncertainty in an otherwise definite and limited decree and which the parties at oral argument agreed did not accord with their understanding.

Unitariness

The starting point in dealing with the first issue, whether or not unitariness has been achieved in faculty/staff hiring, is *Morgan* v. *Nucci*, 831 F.2d 313 (1st Cir. 1987). In that case, BTU appealed on the same issue it raises here: whether the goals of 25 percent black and 10 percent other minority faculty and staff, which were established in the mid-70s and were not yet fully realized, were no longer within the court's jurisdiction because unitariness had been achieved.

We began our analysis in *Nucci* by rehearsing the history of discriminatory hiring and segregationist assignment policies which had isolated black students, teachers, and administrators in a limited number of schools. *Id.* at 327. We then summarized the lengthy history of orders relating to faculty hiring dating from 1975: an initial requirement to hire one black for every white teacher until 20 percent of faculty was black and to pursue an active recruiting program until a goal of 25 percent black faculty was reached; a 1976 order extending the same goals for black administrators; a 1978 order requiring that black faculty increase by at least 1½ percent a year until the 20 percent goal was reached; at 1981 order suspending the affirmative recruitment obligation during a budget crisis but requiring that layoffs preserve existing racial ratios; a 1985 order allowing tenured teachers to be recalled without regard to race; and a 1985 "final" order establishing faculty/staff goals of 25 percent black and 10 percent other minorities with required minimum annual rates of increase of ½ percent and ¼ percent, respectively. *Id.* at 327-28.

We responded to BTU's argument that the implementation of racially neutral personnel practices was "tantamount to unitariness" within the teaching of *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424 (1976) by saying:

> [I]t is well established that a desegregation court is allowed — indeed required — to combat not only existing racial partisanship but also the lingering effects of past discrimination. Thus, the fact that a particular school policy or program may be 'racially neutral,' in that it no longer reflects discriminatory animus, does not prove that the effects of prior discrimination have been purged.
>
> . . .
>
> Here, . . . the makeup of the schools' faculty remains nonunitary judged by the standards established virtually at the inception of the desegregation process. And the record does not suggest these goals have become infeasible, a negative inference buttressed by the failure of the school defendants — who, after all, must execute the hiring orders — to appeal from this aspect of the final orders. Absent the attainment of 'maximum practicable desegregation' in a particular educational area, a district court has every right to require continued compliance with its outstanding orders.

831 F.2d at 328-29 (citations omitted). *See also Bd. of Educ.* v. *Dowell*, 59 U.S.L.W. 4061, 4065 (U.S. Jan. 15, 1991) (court must determine whether vestiges of past discrimination have been eliminated to the extent possible by looking to all facets of school operations).

This is the law of this case. BTU recognizes this fact but asserts that progress during the past five years, the good faith of public officials, and the present degree of compliance warrant a different result. But BTU bears a heavy burden. The determination that a school system has or has not reached a point of "maximum practicable desegregation" in the composition of its faculty and staff is a fact-intensive one. Findings are reversible only if clearly erroneous. *See, e.g., Keyes* v. *School Dist. No. 1*, 895 F.2d 659, 666 (10th Cir. 1990). Moreover, the discretion accorded to a judge who has lived with the case since its inception must be ample. We would not lightly find abuse of such discretion. *See Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28 (1971) ("In this area, we must of necessity rely to a large extent . . . on the informed judgment of the district courts in the first instance . . . .").

What are the essential facts? BTU understandably submits evidence of impressive progress: between 1986 and 1990, blacks and other minorities accounted for 53.49 percent of new hires and 72 percent of newly appointed permanent teachers; they account for 40 percent of all principals and headmasters and 37.28 percent of all other administrators; the School Committee has implemented a voluntary affirmative action plan, with, according to BTU, "no evidence that the BTU is unwilling or unable to negotiate over that item." On the other hand, there are shortfalls that we cannot say are insignificant. While the "other minorities" faculty goal of 10 percent was met as of March 15, 1990, the percentage of blacks was 23.84, 1.16 percentage points below the goal; while black administrators had met the 25 percent goal for both Category I and II administrators, "other minorities" had met the 10 percent goal for Category II, but not for the more important Category I (principals and headmasters); and while blacks now constitute more than 25 percent of the faculty at

one of the three examination schools, the Boston Latin Academy, neither blacks nor other minorities have met the five other percentage goals set for those schools.

The district court arrived at its final judgment in four steps. It first asked for written submissions commenting on a very simple draft final judgment which would have permanently enjoined defendants from racial discrimination and required the maintenance of the Department of Implementation. It then held a hearing to receive oral presentations. Finally, it issued its own "final Judgment" and an accompanying explanatory memorandum.

The court first announced at the oral hearing that the black and other minorities goals were not "picked out of the air" but that the court and the parties had "found that black and other minority faculty were available to the extent of the percentages set." It then stated:

> The Court finds explicitly that there has not been a unitary system achieved in . . . the Boston Public Schools. Before they are unitary in the sense . . . that vestiges of past discrimination have been eliminated, a great deal remains to be done.

In its written memorandum accompanying final judgment, it added that "experience shows that complete compliance . . . is within reach."

We look in vain for any indication that the court committed clear error. Defendants had met the court's yearly percentage increase goals for black faculty in four of the five years between 1984-85 and 1989-90. The default in one year was attributable to the School Board's misreading of the court's requirement. BTU points to a number of articles in educational journals attesting to impending shortages of minority teachers and a memorandum from the Boston Schools Senior Personnel Man-

ager acknowledging this fact. But a reading of the former reveals no statistics for Massachusetts or the New York-New England area and the observation of the Senior Personnel Manager was made in the context of his request for waivers of certification which would facilitate defendants' efforts to comply with the court's requirements. Additionally, the School Defendants seek affirmance of the judgment and "dispute the union's contention that achievement of the remedial goals of staff desegregation are no longer attainable."

Indeed, BTU does not seem to argue that the court wrongly rejected its argument that literal compliance was infeasible. It seems to rest on the proposition that "almost" is as good as "complete." Such a proposition does not replace the customary burden to show that changed circumstances compel a finding of unitariness. In this regard, BTU suggests that a 1.16 percent variance from the goal of 25 percent black faculty and staff employment is a difference of no significance. But even were this the only statistic that did not meet the earlier-established benchmarks, the suggestion is at odds with a basic understanding of the order requiring that the percentage of black employment rise by at least .5 percent per year. Under that order, the school district would not be required fully to reach the 25 percent goal for another three years. In light of this, the court clearly was not wrong in finding the shortfall to be significant.

We therefore find no error in the district court's conclusion that unitariness had not yet been achieved.

Perpetuity of the Order

In discussing BTU's challenges to the order on the ground that it is impermissibly perpetual, we think clarity will be served if we trace its development, noting the problem it was designed to deal with, how it dealt with that problem, and how it was interpreted, before assessing the contentions.

As we have noted, the draft final judgment circulated by the court for comment was basically a stark permanent injunction. Both the written submissions of the parties and their oral presentations revealed a deep concern that the state of compliance was fragile, that over the years, because of the disincentives and obstacles depressing minority recruitment, the seniority system had become one dramatically favoring white teachers and staff, and that any substantial layoff of faculty in order of reverse seniority, as provided for in the collective bargaining agreements, would undo in a day what had taken years to accomplish.

Data were furnished the court showing the paucity of black and other minority faculty and staff possessing seniority dates preceding 1974 and 1977 and an indication of the impact of any seniority-controlled layoff. In preparation for a possible layoff of 450 teachers, a pool of 769 was identified: 45.5% were blacks although they constituted only 23.84% of total faculty; 41.2% were whites although they constituted 66.05% of the total; and 13.3% were other minorities although they constituted 10.11% of the total.

Several suggestions were made to deal with the problem of "skewing" threatened by the fact, as recognized by the court, that "seniority is not a racially neutral criterion in the Boston Public Schools." One suggestion was to require continuing adherence to the 25 percent ratio. Both the plaintiffs and the State Board recommended that the final judgment require maintenance of the goals for a period of three years. By the

end of oral hearing the court obviously had reached a decision in principle. It first stated:

> Will the Court's order have an indefinite duration? No. The Court may not make orders of indefinite duration in these cases. They may make orders only that are operative until the vestiges of the discrimination that was unlawful have been removed. And in this instance there is in . . . the facts that are relevant here a termination point that is obtainable and will be adopted by the court.

It then articulated the concept that its order would terminate when minority faculty would have attained such seniority that layoffs of minority faculty would reflect their proportionate numbers in the system.[1]

In the Final Judgment, the court fixed the size of layoff to be used in determining that seniority "skewing" had been sufficiently corrected. It thereby gave definiteness to the remedy and precluded the assumption that a massive layoff could indefinitely extend the life of the order. The court ordered that defendants

> (3) shall achieve and maintain a desegregated faculty and administrative staff . . . and a desegregated faculty at each of the three examination schools, comprised of not less than 25% blacks and 10% other minorities . . . and, notwithstanding applicable

[1] The court added, by way of illustration: "To repeat, I will try to state this with precision in my written order. Let's assume three hundred layoffs. Let's assume for this purpose 24 percent black, 10 percent other minority faculty. When layoffs result in a laying off of white faculty to the extent of 65 percent of the layoffs, black to the extent of 25 percent, 24, and Hispanics to the extent of 10, then the Court's order with reference to desegregation of faculty and staff will expire by its own terms.

> collective bargaining agreements, shall conduct any reduction in force (RIF) of either faculty or staff in such a manner as to preserve after such RIF substantially the same racial/ethnic proportions of faculty and staff as existed immediately before it; provided that the orders in this paragraph shall expire when black and other minority faculty and staff shall have attained seniority to such an extent that, were a RIF to occur based upon the seniority provisions of applicable collective bargaining agreements reducing faculty and staff by 3% or more, the racial/ethnic proportions of faculty and staff after such a RIF would, in the written opinion of the Superintendent of Schools, be substantially the same as those existing before it.

In its attached memorandum, the court found that such a means was narrowly tailored to achieve important remedial governmental objectives. *See Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986) (plurality opinion) (some heightened scrutiny appropriate for reviewing any race conscious governmental action). *See also City of Richmond* v. *J.A. Croson Co.*, 109 S. Ct. 706 (1989).

BTU's challenge first repeats an argument that it made to the 1985 order, that the words at the inception of the paragraph, "achieve and maintain," mandate perpetual governance. But we say now as we said in *Nucci*, "[o]nce these goals [e.g., 25 percent black faculty ratio] have been adequately reached, the district court's role in the school's personnel policies will end . . . ." 831 F.2d at 329. No "fixed, permanent percentages" have been established by these words.

The words "adequately reached" are the target of BTU's second argument. By its order, the district court effectively has declared that the long-established goals will have been

adequately reached when a Superintendent of Schools can certify that the system is in such shape that, were a 3 percent RIF to take place (i.e., as of the spring of 1990, a layoff of 153 faculty and staff out of a total 5102), and reverse seniority applied in accordance with collective bargaining agreements, there would be no resultant substantial change in racial composition. The district court estimated, from the tenure statistics, that this point would be reached at about the same time as completion of implementation of the United Facilities Plan.

BTU, on the other hand, argues that the goals are adequately reached, if not now, then in that magic moment when the ratio goals are satisfied for the first time. In that moment, it suggests, the court immediately should lose its power to continue remedial orders and defendants should be free to follow practices that will increase racial imbalance. It argues that race-based layoffs as described in part three of the final order are therefore inappropriate.[2]

BTU thus would have us rate achievement of the 25 percent goal as judges at a track meet of a pole vault or high jump event: how high one goes, not how long one stays, is the sole criterion. If there were not some discretion lodged in a desegregation court to attempt in a modest and limited way to assure that the attainment of long sought for goals was not illusory and ephemeral, the entire exercise, into which so many had invested so much, could well prove to have been a painful charade.

This kind of limited monitoring has been recognized as necessary in the two circuits that have had perhaps the most comprehensive and intensive experience in desegregation liti-

[2] We note that BTU does not challenge the district court's remedial power to override seniority *per se*. *See Wygant*, 476 U.S. 267 (raising some question of the appropriateness of race-based layoffs to address any governmental interest). *See also Morgan* v. *O'Bryant*, 671 F.2d 23 (1st Cir. 1982) (affirming at an earlier stage in this case the imposition of seniority override layoffs, vigorously challenged at that time by BTU).

gation. In both the Fifth and Eleventh Circuits, courts have followed the practice of retaining jurisdiction for a three year period after technical compliance with orders has been reached. *Quarles* v. *Oxford Mun. Separate School Dist.*, 868 F.2d 750, 752 (5th Cir. 1989); *Ross* v. *Houston Indep. School Dist.*, 699 F.2d 218, 227 (5th Cir. 1983); *Pitts* v. *Freeman*, 887 F.2d 1438, 1446 n.9 (11th Cir. 1989).

Moreover, BTU's argument would transform "law of the case" into a trap or straitjacket for a court if it could not interpret prior general concepts in the light of later events. In this case, for example, the concept of "adequately reaching" a goal seems to us to require the sort of further definition that we find in paragraph (3) of the Final Judgment. Such a provision gives specificity to what was an abstraction; it does not "reopen [a] point[ ] of law already decided." *White* v. *Higgins*, 116 F.2d 312, 317 (1st Cir. 1940) ("The doctrine of 'law of the case' is not an inexorable command. It 'merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.' " (Citations omitted.) (Magruder, C.J.)). *See also Cornelius* v. *Hogan*, 663 F.2d 330, 334 n.6 (1st Cir. 1981). The court's fine tuning of when percentage goals have been "adequately" achieved to include their ability to withstand a RIF of 3 percent was restrained; it did not push into the remote future the reasonable possibility of meeting the "built-in terminus" as now defined.

We do, however, feel compelled to make one change in the Final Judgment as written. The point of termination of the order was defined as being that when a RIF of "3% or more" could follow reverse seniority without changing racial balance. We see no constructive purpose served by the "or more" language, and the parties at oral argument were unable to help us. The words obviously introduce uncertainty and open-endedness into an otherwise precise concept. We also think that they contravene the intent of the court expressed at the oral hearing. They therefore will be excised.

BTU makes one final argument against Paragraph (3) of a highly technical nature. It argues, so far as we can understand it, that teachers are assigned to many program areas and that restrictions applying to various areas make it impossible to ascertain when a seniority layoff will preserve existing percentages. We merely observe that since 1981 layoffs have been accomplished in such a way as to preserve existing percentages, that presumably predicting the effect of a 3% layoff would pose no greater challenge, and that the School Defendants, who must be relied upon to implement the order, have raised no objection.

Other Minority Faculty

As we have recognized, the 10 percent goal for other minority faculty (but not administrative staff) was reached in March of 1990. BTU argues that other minority faculty now be removed from any protection afforded by the court's order. This argument requires the assumption that progress in desegregation can be fragmented in very small parts. We have of course acknowledged in *Nucci* that the area of student assignments is a discrete sector and that the achievement of unitariness in that sector can be judged independently of progress or lack thereof in other sectors. 831 F.2d at 318-19. But we would not think of further subdividing that area into assignments to particular schools. By the same token we resist the invitation to subdivide faculty and staff into blacks and other minority, or faculty and staff outside of and within examination schools.

In *Nucci* we referred to the applicability of the *Spangler* doctrine of selective unitariness "where unitariness has been achieved, as to either the entire school system or a wholly separable subset thereof." 831 F.2d at 319 n.5. We cannot look on "other minority faculty" as a "wholly separable subset."

To do so would open the door to substantial regression in the employment of other minority teachers at the very time when court-ordered increases in black faculty are continuing. Indeed the latter might well be taking place at the expense of other minority faculty. We therefore conclude that the relevant separable subset at issue here is the universe of faculty and staff desegregation orders, and we decline to dissect further this "facet of school operations." *Dowell*, 59 U.S.L.W. at 4065.

Conclusion

We therefore amend part (3) of the Final Judgment providing for faculty and staff desegregation by deleting "or more" after "3%." We affirm the Judgment as amended.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TALLULAH MORGAN, ET AL., Plaintiffs	)	
	)	CIVIL ACTION
v.	)	NO. 72-911-G
DANIEL R. BURKE, ET AL., Defendants	)	

FINAL JUDGMENT[1]

May 31, 1990

GARRITY, J.

After hearing on May 21, 1990, and consideration of the objections, comments and proposals for modifications filed pursuant to the Court's Order to Show Cause dated April 19, 1990, and confirming oral orders stated in open court at the conclusion of said hearing, and on grounds then stated (except that the grounds for the Court's orders regarding faculty and staff are expanded in the Court's memorandum filed contemporaneously herewith), it is ORDERED and ADJUDGED that the school defendants, viz., members of the Boston School Committee, Superintendent of Schools, their officers, agents, servants, employees, attorneys and all other persons in active

[1] The Court has under advisement plaintiffs' application for an award of attorneys' fees and expenses.

concert or participation with them who have actual notice of these orders:

Unified Facilities Plan

(1) shall take all steps reasonably necessary, jointly with the city and state defendants, to whom this paragraph also applies, to complete implementation of Unified Facilities Plan (UFP) dated March 25, 1985 and of the Court's UFP Orders entered on September 3, 1985 approving and modifying said UFP[2] including the obligation of the city defendants to appropriate and expend levels of maintenance funds reported to the Court in a memorandum from counsel for the State Board of Education dated May 2, 1988.[3]

Department of Implementation

(2) shall maintain the Department of Implementation (DI) at school department headquarters with substantially the same structure, units (Assignment, External Liaison, Record Management and Transportation) and functions which were established by the Court's Memorandum and Orders dated May 6, 1977, at pp. 32-35, and are still essentially unchanged.[4]

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[2] The Court's Memorandum and Orders explaining the origins and development of the UFP is reported in *Morgan et al.* v. *Nucci et al.*, D. Mass. 1985, 617 F. Supp. 1316; but the UFP itself is not reported because too lengthy and technical — only its Table of Contents, at p. 1328, as Appendix A. Note, too, that the word "introduction" in UFP Order 1., at p. 1327, refers to the introduction in the UFP, at the third unnumbered page thereof, and not to the introduction to the Court's Memorandum and Orders at pp. 1317-18.

[3] The city defendants' undertaking reported in said memorandum provides for a level of funding of at least $13,500,000 in fiscal year 1991 and all subsequent fiscal years until the UFP has been fully implemented.

[4] In 1979, in keeping with similar title revisions, the head of the DI became a senior officer instead of an associated superintendent. In 1981 the Student and Personnel Unit was renamed the Assignment Unit and the Facilities and Transportation Unit was renamed the Transportation Unit. Under the Willie-

Faculty and Staff

(3) shall achieve and maintain a desegregated faculty and administrative staff (hereinafter "staff"), and a desegregated faculty at each of the three examination schools, comprised of not less than 25% blacks and 10% other minorities by increasing, if said percentage goals be not achieved or not maintained, the proportions of black faculty and staff at the rate of not less than one-half percent annually and of other minority faculty and staff at the rate of not less than one-quarter percent annually and, notwithstanding applicable collective bargaining agreements, shall conduct any reduction in force (RIF) of either faculty or staff in such a manner as to preserve after such RIF substantially the same racial/ethnic proportions of faculty and staff as existed immediately before it; provided that the orders in this paragraph shall expire when black and other minority faculty and staff shall have attained seniority to such an extent that, were a RIF to occur based upon the seniority provisions of applicable collective bargaining agreements reducing faculty and staff by 3% or more, the racial/ethnic proportions of faculty and staff after such a RIF would, in the written opinion of the Superintendent of Schools, be substantially the same as those existing before it.

Permanent Injunction

(4) be permanently enjoined from discriminating on the basis of race in the operation of the public schools of the City of Boston and from creating, promoting or maintaining racial segregation in any school or other facility in the Boston public school system.

/s/ W. Arthur Garrity, Jr.
United States District Judge

Alves Controlled Choice Plan, some DI staff are assigned as liaison to the new Parent Information Centers, but the DI's central authority over assignments and transportation arrangements is unchanged.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TALLULAH MORGAN, ET AL., Plaintiffs	)	
	)	CIVIL ACTION
v.	)	NO. 72-911-G
	)	
DANIEL R. BURKE, ET AL., Defendants	)	

MEMORANDUM

May 31, 1990

Final judgment paragraph (3) on "Faculty and Staff" is based upon (a) the Court's prior findings of fact supporting previous orders for the desegregation of faculty and administrative staff, (b) the law of the case as explicated by the Court of Appeals in *Morgan et al.* v. *O'Bryant et al.*, 1 Cir. 1982, 671 F.2d 23, (c) the vindication of important governmental interests, and (d) the continuing need of the plaintiff classes for the desegregation of faculty and administrative staff. Grounds (a) and (b) require no elaboration.

The governmental objectives that we find will be served by the orders in paragraph (3) are described in Plaintiffs' Comments Concerning Final Judgment and are as follows:

— redressing the cumulative impact of racial discrimination in the Boston public school system so extensive that a dual school system resulted,

— redressing egregious racial discrimination in hiring teachers and appointing administrators, to the detriment of the plaintiff classes, and

— promoting goals of 25% and 10% adopted by the school defendants to promote racial diversity among faculty and staff.

The means chosen in paragraph (3) we believe to be narrowly tailored. In large measure they preserve gains in faculty and staff desegregation already achieved by the school defendants' substantial if flawed compliance with previous orders of the Court. Experience shows that compiete compliance in this area of the case is within reach.

At the hearing, the parties demonstrated and the Court found that seniority under applicable collective bargaining agreements would not now be a racially neutral standard for likely reductions of faculty and staff. The orders in paragraph (3) will expire according to their terms as soon as minority faculty and staff shall have achieved seniority such that seniority would be a racially neutral standard, at least to the extent of implementing the school defendants' affirmative action policy. While impossible to fix this time precisely, the Court's review of the tenure statistics included in the parties' filings indicates that these faculty and staff orders may well terminate at about the same time as do the orders in paragraph (1) on the Unified Facility Plan.

On motion of intervenor plaintiffs El Comite de Padres, the Court received in evidence, without objection, eighteen exhibits originally appended to their brief. They show, and we find, that black and other minority pupils, especially Hispanics who form the fastest growing segment of the school population, are not promoted and drop out of school at rates much higher than for white pupils. In our opinion, the need for desegregated faculty expressed in *Morgan et al.* v. *O'Bryant et al.*, *supra* at 27, still obtains, as follows:

> An integrated faculty and staff is also necessary to bring black students and parents fully into the school community and decisionmaking processes and to counteract their past isolation. A racially balanced faculty also provides black students with role models,
>
> . . . .

Meeting this need will be an important milestone on the long road to affording equal educational opportunity to all students in Boston's public schools.

/s/ W. Arthur Garrity, Jr.
United States District Judge

APPENDIX D

Excerpts of the Collective Bargaining Agreement

. . . . . .

12. Student Discipline

(a) Other features of school discipline shall be spelled out in the form of a memorandum of agreement between the parties; such memorandum shall represent a comprehensive Discipline Code. It shall be distributed to all teachers.

(b) The Committee agrees that a Union committee shall conduct a yearly review of the "Code of Discipline" and that the committee shall accept the union committee's recommendations as considerations for committee action.

(c) Teachers directly involved in the suspension of a student shall have the opportunity, if requested, to confer with student's parents or legal guardians prior to the readmission of the suspended student.

13. Information at the School

(a) All official circulars shall be posted on school bulletin boards for inspection of teachers and shall be made available to teachers on request and shall be kept in an available file with a dated check list.

(b) A copy of current teaching programs, non-teaching assignments, administrative and planning and development periods shall be available at each school.

(c) Each school shall have a copy of the Committee Rules and Regulations available to the teachers.

(d) The school time schedule will be posted in September in an area accessible to the entire faculty.

(e) Information on the accumulated sick leave for each teacher shall be sent to each teacher upon request. Upon the installation of required data processing equipment, all teachers shall be informed in writing of their total number of sick days available at the close of the prior school year, at the time of the receipt of their first pay checks in the current school year.

(f) All catalogs, approved lists for educational materials, and book order forms shall be delivered to the schools a minimum of six (6) weeks before these orders are to be placed.

14. Cooperating Teachers

(a) A joint study by Committee representatives and Union representatives shall be made for compensation of cooperating teachers.

(b) Any teacher requested to accept a trainee shall have at least one week's advance notice, and may refuse.

Student nurse observers shall be assigned to nurses who agree to have them. The colleges and hospitals sending them should be requested to send appropriate lecturers to School Nurse In-Service Programs.

(c) Each cooperating teacher shall be given two days of leave, with pay, without loss of benefits. Such days shall be taken as mutually agreed upon by the teacher and the administrative head during the last two weeks of the student-teacher training period. In cases of conflict, seniority shall prevail in the selection of days.

15. Program areas and qualifications:

(a) Employees shall be assigned to program areas to which they are qualified. Program areas are listed in Appendix A. The Committee reserves the right to establish additional program areas, subject to any collective bargaining obligation as may be required by law.

(b) Employees shall be deemed qualified in a program area by holding a state certificate or approval for such area and by meeting one of the following criteria:

1. A state certificate not more than five (5) years old.
2. A mean score on the National Teachers Examination, not more than ten (10) years old.
3. Fifteen (15) course credits, graduate or undergraduate, approved as relevant to qualification, all of which are not more than five (5) years old.
4. Two (2) years of teaching experience within ten (10) years. A creditable year is one in which at least 50% of the weekly schedule is in the subject area.

(c) Teachers shall be ranked by seniority (as defined in Article IV A5) within each program area, including teachers on recall lists.

(d) For the purposes of determining qualifications and placement in a program area, all valid credentials must be filed with the Personnel Department on or before March 15.

(e) Employees must respond to alleged erroneous placement or non-placement in a program area or to an error in their seniority date within thirty (30) days of the receipt of such information from the School Department.

(f) Teachers on leave of absence for more than ten (10) years or who were promoted out of the bargaining unit shall be considered qualified in the program area in which they taught immediately prior to such leave of absence or promotion in addition to any program area in which they are qualified under Section (b).

(g) Teachers on recall shall be placed in program areas in which they are qualified under Section (b).

(h) Teachers who recall rights were extended to August 31, 1984 under the predecessor contract shall retain the

right to be recalled on or before August 31, 1984 to state certification areas in which they held seniority under the predecessor contract. In the event a teacher is noticed for such recall prior to July 15, 1984, the Committee may require such teacher to successfully complete a summer training course sponsored by the School Department to insure qualification.

In no event shall a teacher holding a state certificate in Business or Music or a general state certificate be allowed to exercise recall rights under this Section (h) without first demonstrating proficiency in the program area in which recall rights may be claimed.

(i) The following special provisions shall apply to SPED teachers, superseding any conflicting provision of the 1983 Settlement Agreement. All article references in this proposal refer to that Settlement Agreement.

1. Employees shall be assigned to one of the SPED program areas or categories (see Appendix).
2. SPED teachers shall be deemed qualified in any such program area or category in any manner specified in IV C 17(b), subject to the specific additional requirements listed in the attached Appendix. In addition:
   (a) Any SPED teacher, including an ETL, is deemed qualified in Program Area 12 and its categories (subject to special certification requirements).
   (b) An ETL is considered qualified in the program area in which (s)he taught immediately prior to becoming an ETL.
   (c) A SPED teacher hired on or after September 1, 1986 with an 003 certificate shall not be deemed qualified to teach in any specific program (e.g., LD, SAR, ESD) without evidence of satisfactorily completed coursework related to such program. The Department will accept evidence of enrollment

as a valid credential, subject to satisfactory completion of such courses on a time line as mutually agreed by a teacher and the Department.

3. Any SPED teacher may exercise layoff, transfer, recall and excessing rights, in accordance with the general provisions of Article IVC 17-22, in any program area in which such teacher is qualified, except that:
   (a) No teacher who is targeted for excessing from a category other than 12f or 12g may displace a teacher in 12f or 12g (prior to being placed in the system-wide excess pool) without prior experience in such category;
   (b) teachers in Program Area 2 shall be excessed by category;
   (c) teachers laid off from Program Area 12 and currently teaching in category 12h or with prior experience in Category 12h (in compliance with Article IVC 17-22) shall be considered qualified to displace junior teachers in Program Area 13 who are working in 502.4 cluster programs and to displace any provisional teacher in Program Area 13; but *not* to displace any junior tenured teacher at the McKinley School or in any other severe lab 502.4i program.
4. Teachers currently teaching in category (a) of Program Area 2 and in Program Areas 5, 6, 7, and 8 shall be grandfathered and shall not be displaced or otherwise adversely affected by any additional requirements specified in this agreement; provided, however, they shall be affected by any new state-imposed requirements.

(j) Bilingual Teachers:
Years taught in the bilingual program shall count as teaching experience in the corresponding Regular Education program area; provided that such teacher is state-certified and is proficient in the English language.

16. Layoff and Recall Procedure

(a) This layoff and recall procedure will not apply to non-tenured teachers but will apply to teachers with tenure and to nurses or other persons permanently appointed.

For the purpose of this section, all nurses with more than 3 consecutive years of service are deemed to be "permanently appointed" and nursing service will be considered a separate program area.

(b) An employee will be given written notice of layoff by May 15 of the professional work year preceding the professional work year in which the layoff is to take place. For example, an employee to be laid off effective in September must be given written notice on or before the prior May 15.

(c) Employees will be laid off in reverse order of seniority within a program area. A senior employee within a program area with notice of layoff may exercise seniority by displacing the most junior teacher in all of the other program areas in which he is qualified.

(d) A person promoted out of their bargaining unit on or after 9/1/80 will retain full seniority rights in all areas in which he holds state certification but shall not accrue seniority while outside of the bargaining unit. For purposes of this section a teacher "on assignment" outside of the bargaining unit for more than sixty (60) days is not considered to have been "promoted" and may continue to accrue seniority within this bargaining unit.

Any person promoted out of this bargaining unit prior to September 1, 1980 shall not accrue additional bargaining unit seniority for service outside the bargaining unit after August 31, 1983.

For the purpose of this section, an employee with notice of layoff may exercise his seniority rights in the order specified in subsection (c).

(e) Recall

(1) Persons on recall will be given first preference in filling permanent vacancies within the bargaining unit which arise prior to March 15 and in filing temporary full-year vacancies (to remain vacant for the rest of the year) arising prior to December 1.

(2) A recall will be by seniority to a vacancy in a program area in which a person is qualified at time of recall, subject to the provisions of IVC 17(d) of the Settlement Agreement.

(3) Seniority shall not accrue to an employee while on recall.

(4) A teacher who is offered recall to a full-year vacancy must accept or reject the offer within three (3) days excluding Saturday, Sunday or a holiday after receipt of the offer and, upon acceptance, must be prepared to work no later than the Monday second next following acceptance of the offer; provided, however, a later reporting date will be allowed if a teacher is required to give up to two (2) weeks' notice to a current employer.

(5) Recall rights for employees laid off prior to 1986 are terminated as of October 1, 1989. Teachers who reject a recall offer made on or before March 15 of any year for a teaching assignment to commence at the beginning of the next school year shall relinquish all recall rights.

(6) Employees who continued to be employed in seniority areas outside the ones in which they were teaching immediately prior to layoff shall be eligible to fill future vacancies in such program areas, in order of seniority, once the recall list, for any such areas have been exhausted.

(7) Severance Payment:
Teachers returning from recall shall not become eligible for severance pay, under Article IIIJ, unless they complete the work year.

(f) Resolution of Disputes
Same as IIIC 20 of predecessor contract, except delete "excessing policy or excessing procedure."

(g) This layoff and recall procedure is subject to all applicable State and Federal laws and lawful orders pursuant thereto.

17. Excessing Procedure

(a) This excessing procedure will not apply to non-tenured teachers but will apply to tenured teachers and nurses with more than three (3) consecutive years of service. Although the excessing process will normally be utilized in the spring and summer for assignments to be effected at the beginning of a school year, nothing herein shall prevent the Committee from excessing teachers during a school year.

(b) Excessing from a school building shall be first by volunteers within a program area. An employee who holds seniority in a program area other than the one from which he has been excessed shall be offered a vacancy in the building in such other program area. If there is no such vacancy he will be placed directly onto a system-wide excess list.

(c) In the event of excessing during the school year on or after November 1, in cases of class consolidation, the Department may elect to excess and reassign the junior teacher in one of the classes being consolidated rather than the least senior teacher in the program area within the building.

Not more than five (5) days notice shall be required for excessing during a school year.

(d) Permanent or temporary vacancies within a program area will be filled from the system-wide excess list periodically by matching the aggregate number of such vacancies against an equal number of persons on the excess list by seniority within such program area, in accordance with the following procedure:

Teachers will bid on listed vacancies in order of seniority. Each teacher must make three (3) bids, except that the next-to-last teacher must make two (2) bids and the most junior teacher must make one (1) bid. When a vacancy has received three (3) bids, bidding will be closed on that vacancy. Teachers will be assigned to one (1) of their bids.

Teachers in the excess pool shall be limited to one (1) bid per school.

(e) The Personnel Department will set the initial date for filling vacancies from the system-wide excess during the month of May or as soon as practical thereafter. Vacancies will continue to be filled until late August, at which time teachers who are not matched against vacancies will be assigned in a suitable professional capacity, including substitute service, and will remain eligible to fill vacancies as they occur up to November 1. There shall be no bumping from the system-wide excess list.

The Committee shall not be required to post in the teachers reassignment pool any position held by a non-tenured teacher who has been made "permanent" by the Committee.

(f) An employee exercising a right to return to the teacher bargaining unit after layoff or demotion shall be carried on the system-wide excess list in the applicable program area.

(g) An excessed employee who is excessed from his building and who is qualified in more than one (1) program area may elect annually to bid for assignment in one (1) program area other than the one from which he was excessed, in which case he will bid only within the newly elected program area; provided, however, such election may not be made into a program area in which there is an active recall list.

18. Resolution of Disputes

Disputes concerning the interpretation or application of this excessing policy will be processed as grievances under the contractual grievance and arbitration procedure as modified herein:

(a) all intermediate steps are hereby waived;

(b) counsel for the B.T.U. and the Committee shall cooperate in obtaining the services of a referee who shall be available to arbitrate the dispute within one week after a grievance is communicated by the Union;

(c) arbitrate will be conducted on an expedited basis without written briefs and with oral or written awards to be rendered not later than three days following the date of hearing not to exceed one day.

It is the intent of the parties that wherever possible remedial relief of any violation shall not delay implementation of an excessing procedure nor require the undoing of sequentially filled vacancies made in good faith.

19. Miscellaneous

The excessing, layoff and recall procedures are subject to all applicable state and federal laws and lawful orders pursuant thereto.

The parties will cooperate in addressing any special problems that may exist in any school in relation to this policy.

BOSTON PUBLIC SCHOOLS

APPENDIX A

TEACHER PROGRAM AREAS

REGULAR EDUCATION

Program Area	Required State Cert. Approval	Complete Yrs of Experience Required in Program Area	Additional Requirements for Special Areas
Art	47	3	
Bookeeping	43	3	
Economics	43	3	
Office Practice	43	3	
Shorthand/Typing	43	3	
General Business	43	3	
Social Studies	14,13,12	3	
Health Education	42	3	
English	11	3	
French	21	3	
German	22	3	
Italian	24	3	
Latin	29	3	
Spanish	23	3	
Mathematics	15	3	
Biology	18	3	
Chemistry	16	3	
General Science	19	3	
Physics	17	3	
Earth Science	20	3	
Elementary/Kindergaten (K-6)	01	3	
Music-Instrumental	48	3	Instrument-Specific
Music-Vocal	48	3	

REGULAR EDUCATION (cont.)

Program Area	Required State Cert. Approval	Complete Yrs of Experience Required in Program Area	Additional Requirements for Special Areas
Reading	46	3	
School Librarian	84	3	
Physical Education	41	3	
Home Economics	44	3	
Drama	49	3	
Industrial Arts	45	3	*Specialties may be required.
Computer Instructor	Any valid Certificate	3	*15 credits in Computer Education as defined in appropriate Circulars.

BILINGUAL

Program Area	Required State Cert. Approval	Complete Yrs of Experience Required in Program Area	Additional Requirements for Special Areas
Kindergarten	B01	3	Appropriate language is required for each Program Area: (Cape Verdean, Chinese, Greek,
Elementary (Grades 1-6)	B01	3	
English	B11	3	
History	B12,B13, B14	3	
Mathematics	B15	3	
Chemistry	B16	3	

BILINGUAL (cont.)

Program Area	Required State Cert. Approval	Complete Yrs of Experience Required in Program Area	Additional Requirements for Special Areas
Physics	B17	3	Haitian, Italian, Portuguese, Russian, Spanish, Vietnamese, Laotian, Cambodian, and any other language for which BPS has a bilingual program).
Biology	B18	3	
General Science	B19	3	
Earth Science	B20	3	
French	B21	3	
Spanish	B23	3	
Italian	B24	3	
Russian	B25	3	
Portuguese	B27	3	
Other Modern Language	B28	3	
Greek	B30	3	
Business Subject	B43	3	
Drama	B49	3	
English as a Second Language (K-6)	01,10	3	Proficiency in native language 01 + (3) ESL Methods Course
English as a Second Language (7-12)	11,10	3	Proficiency in native language 11 + (3) ESL Methods Course

OCCUPATIONAL EDUCATION

Program Area	Required State Cert. Approval	Complete Yrs of Experience Required in Program Area	Additional Requirements for Special Areas
Dental Assistant	H41	3	
Nurses Aide	A36,A40	3	
Health Sciences	H44	3	
Medical Lab. Technology	H45	3	
Medical Assist./Sec'y	H43	3	
Cabinetmaking (Bench/ Mill Carpentry)	T09,T08	3	
Carpentry	T07	3	
Plumbing	T24	3	
Building Maintenance Repair	T12,T53, T57	3	
Drafting	T13,T14	3	
Banking	SC7	3	
Child Care	F58	3	
Cosmetology	T28	3	
Fashion/Interior	F62,F66 F77	3	
Food Service	T25,T26, F60	3	
Hotel/Hospitality	SC7	3	
Retailing/Marketing/ Management	SC7	3	
Commercial Design	T21	3	
Fashion Illustration	T67	3	
Machine Drafting	T13	3	
Photographic Technology	T79	3	
Printing	T18,T19, T20	3	
Television Production	T70	3	
Data Processing	T54	3	

OCCUPATIONAL EDUCATION (cont.)

Program Area	Required State Cert. Approval	Complete Yrs of Experience Required in Program Area	Additional Requirements for Special Areas
Auto Body Repair	T01	3	
Machine Laboratory	T31	3	
Sheet Metal	T32	3	
Welding Laboratory	T35	3	
Automotive/Truck Repair	T05,T02		
Marine and Small Engine Repair	T06,T80	3	
Electricity	T23	3	
Electronics	T55,T30	3	
Heating/Air Conditioning/ Ventilation	T29	3	

SPECIAL EDUCATION

Program Area	Category	Required State Certificate or Approval	Additional Requirements
1. Audition		58, 300, 06	Sign Language
2. Speech, Hearing and Language	a. Speech & Hearing	57	
	b. Language	57 (plus any) 003, 100, 200,	
3. Vision		400, 005	
4. Peripatology		400, 005	Cert. by Ass'n of workers for the blind.

SPECIAL EDUCATION (cont.)

Program Area	Category	Required State Certificate or Approval	Additional Requirements
5. Adaptive Phys. Ed.		41 plus any 003, 56, 100, 200, 750	
6. Voc. Special Educ.		Voc. approval plus any 003, 56, 100, 200, 750	
7. Bilingual Special Ed.		Bil. Certif. plus appropriate Spec. Ed. approval	Appropriate Language
8. Bilingual Vocational Special Ed.	Vocational approval plus	Bilingual Certif. plus any 003, 56, 100, 200, 750	Appropriate Language
9. ETL		Any Special Ed. approval/ Cert. or 7502	Circular and approval
10. Early Childhood			

SPECIAL EDUCATION (cont.)

Program Area	Category	Required State Certificate or Approval	Additional Requirements
11. Severe Special	a. Multiply Handicapped	004	Prior experience: Sign Language
	b. Developmental Disabilities	004	
12. Mild-to-Moderate Special Needs	a. Mild Generic	500, 002	
	b. Resource Room	002, 003, 56 100,200, 750	
	c. Learning Disabilities	003, 56, 100, 200, 750	
	d. Supp. Acad. Remediation	003, 56, 100, 200, 750	
	e. Primary Transition	003, 56, 100, 200, 750	
	f. Physically Handicapped	003, 45, 100, 200 750	
	g. Education and Social Dev.	003, 56, 100, 200 750	
	h. Learning Adaptive Behav.	003, 56, 100, 200, 750	

SPECIAL EDUCATION (cont.)

Program Area	Category	Required State Certificate or Approval	Additional Requirements
13. Severe LAB (Low, Incid.) including 502.4 LAB Cluster Program, McKinley Schools or Additional 502.4i		003, 200 750	Prior experience and additional quals based on type of program; circular and approval

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TALLULAH MORGAN, ET AL., Plaintiffs	)	
v.	)	CIVIL ACTION NO. 72-911-G
JOHN A. NUCCI, ET AL., Defendants	)	

FINAL ORDERS

September 3, 1985

GARRITY, J.

After hearing and consideration of the parties' comments and positions on the draft final judgment[1] issued on July 5, 1985, and on the basis of all orders and memoranda of decisions previously entered in these proceedings, it is ORDERED and ADJUDGED that the school defendants, viz., members of the Boston school committee, Superintendent of Schools, their officers, agents, servants employees, attorneys, and all other persons in active concert or participation with them who have actual notice of these orders:

Unified Facilities Plan

(1) shall take all steps reasonably necessary, jointly with the city and state defendants, to whom this paragraph also

[1] In titling these orders "Final Orders" instead of "Final Judgment", as first drafted, we follow the precedent and adopt the reasoning of Judge McMillan in removing the cause from the active docket and closing the file in *Swann* v. *Charlotte-Mecklenburg Board of Education*, W.D. N.C. 1975, 67 F.R.D. 648.

applies, to implement the Unified Facilities Plan as approved and modified by orders entered contemporaneously herewith.

Permanent Injunction

(2) be permanently enjoined from discriminating on the basis of race in the operation of the public schools of the City of Boston and from creating, promoting or maintaining racial segregation in any school or other facility in the Boston public school system;

Student Assignments

(3) (a) shall compose enrollments at each school so that its racial/ethnic proportions shall be consistent with current guidelines which shall be derived, with respect to citywide magnet schools and programs, from the citywide public school population and, with respect to district schools, from the public school populations of their current districts or consolidations thereof; and procedures for assigning students shall be objective, written and available to the public.

(b) alternatively, may beginning with the 1986-87 school year or thereafter use a single, citywide guideline for assigning students by composing enrollments at every school (except District 8 schools) so that its racial/ethnic proportions exclusive of entering K-1 students are within a range determined by a factor of .25 times the percent of each racial/ethnic group and are based upon the citywide public school population in K-1 through 12 as of about April 1 of the previous school year, minus (i) students enrolled in bilingual classes, (ii) students with special needs who are classified as substantially separate and (iii) students residing in District 8; provided further that, where necessary, the Department of Implementation may assign no other minority students to selected elementary schools, in which event their absence shall be offset by additional white students; and provided further that procedures for assigning students shall be objective, written and available to the public.

Parent Councils

(4) shall promote the court-established parent councils, and any successor organizations, and assist them in functioning as self-governing organizations capable of meeting their court-ordered responsibilities; and shall fund them for at least three years from this date; and shall appoint to any School Improvement Council formed at any school pursuant to Chapter 188 of the Acts of 1985, parent membership elected by the related School Parent Council or successor organization.

Faculty and Staff

(5) shall achieve and maintain a desegregated faculty and administrative staff which are each comprisesd of not less than 25% blacks and 10% other minorities, by increasing the proportions of black faculty and administrative staff at a rate of not less than one-half percent annually and the proportion of other minority faculty at the rate of not less than one-quarter percent annually, and of other minority administrative staff in accordance with the parties' agreement for a one out of three hiring ratio, approved and ordered by the court on November 26, 1984 and July 5, 1985.

and, at each of the three examination schools, a 25% black faculty within five years; and a 10% other minority faculty.

Department of Implementation

(6) shall maintain the Department of Implementation as a distinct unit, adequately staffed and with full access to computer facilities, capable of meeting its court-ordered responsibilities;

Previous Orders

(7) shall carry out all existing orders imposing a duty on the school defendants previously entered in areas in which the

court has not terminated its jurisdiction and, if modified as hereinafter provided, such modified orders.

Modification Procedure

(8) The school defendants may propose modifications to any order previously entered in these proceedings provided (a) that such proposed modification is specific and does not violate the permanent orders stated in the seven preceding paragraphs and (b) that notice and opportunity to be heard is given, as follows: they shall issue a public notice identifying the order to be modified and the proposed modification; and shall mail copies to (a) the State Board of Education, (b) the Attorney General for the Commonwealth, (c) the Mayor, (d) the Citywide Parent Council (e) the Boston chapter of the NAACP and (f) the Council of Administrators of Hispanic Agencies in Boston (CAHA), to all of whom the Department of Implementation shall promptly make available all relevant data reasonably requested. The Board of Education shall within three weeks initiate and moderate negotiations concerning the proposed modification or determine that the proposed modification is insubstantial or an emergency matter which the School Committee may adopt without negotiation. After agreement has been reached or the Board has determined that further negotiations would not result in agreement, or more than three months have passed since the public notice was given, whichever is earliest, the School Committee may (unless State Board approval is necessary under state law and has not been obtained) adopt or reject such proposed modification either as initially proposed or amended during negotiations.[2]

/s/ W. Arthur Garrity, Jr.
United States District Judge

[2] A memorandum regarding these final orders will be filed at a later date.

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TALLULAH MORGAN, ET AL., Plaintiffs	)	
v.	)	CIVIL ACTION NO. 72-911-G
DANIEL R. BURKE, ET AL., Defendants	)	

ORDER TO SHOW CAUSE
and
PROCEDURAL ORDER

April 19, 1990

GARRITY, JR.

Confirming oral orders issued in open court on April 18, 1990 and on grounds then stated, it is ORDERED that the parties show cause, if any there be, at a hearing on May 21, 1990 at at 10:00 A.M. why Final Judgment should not be entered in these proceedings in substantially the form hereto attached.

It is further ORDERED that written objections, comments and proposals for modifications be filed on or before May 16, 1990.

/s/ W. Arthur Garrity, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TALLULAH MORGAN, ET AL., Plaintiffs	)	
v.	)	CIVIL ACTION NO. 72-911-G
DANIEL R. BURKE, ET AL., Defendants	)	

(DRAFT) FINAL JUDGMENT

May , 1990

GARRITY, J.

On the basis of all orders and memoranda of decisions previously entered in these proceedings and with the consent of the plaintiffs, plaintiff intervenors and school, city and state defendants, it is ORDERED and ADJUDGED that the school defendants, viz., members of the Boston school committee, Superintendent of Schools, their officers, agents, servants employees, attorneys, and all other persons in active concert or participation with them who have actual notice of these orders:

Permanent Injunction

(1) be permamently enjoined from discriminating on the basis of race in the operation of the public schools of the City of

Boston and from creating, promoting or maintaining racial segregation in any school or other facility in the Boston public school system; and

Department of Implemenation

(2) shall maintain the Department of Implementation as a distinct unit, adequately staffed and with full access to computer facilities, capable of meeting its court-ordered responsibilities.

United States District Judge

APPENDIX G

Pages 1-70

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TALLULAH MORGAN, ET AL., Plaintiffs	)	
v.	)	CIVIL ACTION NO. 72-911-G
DANIEL BURKE, ET AL., Defendants	)	

HEARING

BEFORE: HONORABLE W. ARTHUR GARRITY, JR., DISTRICT JUDGE

APPEARANCES: Thomas I. Atkins, Esquire, 135 Eastern Parkway, No. 11-B-1, Brooklyn, New York, NY 11238, for the Plaintiffs.

Robert Pressman, Esquire, Center for Law and Education, 955 Massachusetts Avenue, Cambridge, MA 02139, for the Plaintiffs.

Caroline B. Playter, Esquire, Kehoe, Doyle, Playter & Novick, Nine Hamilton Place, Boston, Massachusetts 02108, for the Plaintiff Intervenor El Comite de Padres.

Henry C. Dinger, Esquire, Goodwin, Procter & Hoar, Exchange Place, Boston, MA 02109, for the School Defendants.

Marien E. Evans, First Assistant General Counsel, Boston Public Schools, 26 Court Street, Boston, MA 02108, for the Defendants.

Robert H. Blumenthal, Esquire, Commonwealth of Massachusetts, Department of Education, Quincy Center Plaza, 1385 Hancock Street, Quincy, MA 02169, for the Defendant State Board of Education.

Nancy Gertner, Esquire, Silverglate, Gertner, Fine & Good, 89 Broad Street, 14th Floor, Boston, MA 02110, for the Concerned Black Educators of Boston.

Matthew E. Dwyer, Grady & Dwyer, Two Center Plaza, Boston, MA 02108, for the Boston Teachers' Union.

Steven Perlmutter, Esquire, Harrison & Maguire, 24 School Street, Boston, MA 02108, for the City Defendants.

Richard W. Coleman, Esquire, 11 Beacon Street, Boston, MA 02108, for the Boston Association for School Administrators and Supervisors.

Also Present: Manuel Monteiro, for the Boston Public Schools

Courtroom No. 3
Boston, MA
Monday, May 21, 1990
10:10 a.m.

COMPUTER-AIDED TRANSCRIPTION

[2]

PROCEEDINGS

THE COURT: Before we get seated this morning I wanted to make reference to an item of sad news that I received only a few minutes ago and that was of the passing this morning of Franklin Parks who was a state monitor — Banks, I'm sorry — Franklin Parks, excuse me, who was the state monitor during the disengagement period and was a key person in making

the progress that's been made in this case thus far. He passed away, Mr. Banks did this morning. And I would ask only that we remain standing for a minute or so in his memory and in respect for what he did for us all.

(Pause.)

THE CLERK: Court is open. You may be seated. Civil Action 72-911-G, Tallulah Morgan, et al. versus the Boston School Committee, et al.

THE COURT: This is the third courtroom that we have been assigned this morning. And I think we'll be able to stay here as long as necessary.

I know every one I believe but we do have a new reporter. And those who plan to address the Court, would you kindly identify yourselves starting with Ms. Playter and Mr. Atkins and so forth unless you have done so already.

MS. PLAYTER: We have, Your Honor.

THE COURT: Fine.

MR. COLEMAN: Your Honor, I have not given my [3] name. Richard W. Coleman for the Boston Association of School Administrators and Supervisors.

THE COURT: Fine.

I have read all these filings. And before hearing from counsel I should probably state the issue that's of priority and more or less paramount issue in my view but not addressed by the parties. And it's a different understanding than what some but not many of the parties have and that has to do with the effect of the final judgment in this case.

The final judgment proposed by the Court in its order to show cause setting up this morning's hearing was premised on the understanding that previous orders of the Court which have not yet been complied with are still outstanding and would be in no way nullified by the entry of a final judgment in the case. The best illustration probably would be the Unified Facil-

ities Plan which five years ago adopted undertakings largely stipulated by the parties but not — stipulated after a decade of effort on the part of the Court and the parties to this case.

Entry of a final judgment here would in no way nullify the obligations of the city and the state and municipal and school department officials to carry out the Unified Facilities Plan. Similarly and perhaps most importantly, the obligations of the School Department with reference to the faculty and administrative staff desegregation would not be [4] abolished. And it is not my thinking that entry of a final judgment in this case would nullify the order previously entered. The parties' obligations with reference to faculty and administrative staff desegregation were litigated thoroughly before and I took with me this morning only one of the numerous decisions in that area. And that's the decision of the Court of Appeals in Morgan vs. O'Brien, 671 F.2d, page 23, a 1982 decision which discusses the law thoroughly.

So that it had not been my thinking when issuing this order to show cause to change the parties' obligations with reference to those aspects of the case or several others. Then, of course, in reading the parties submissions I could see that counsel, at least some, had a different notion because they proposed what they called a vacatur. I've never seen that word in legal writing before frankly, a vacatur. It would mean a termination. Everything that was not spelled out in an order to be entered as a result of the hearings today would be nullified including presumably the facilities plan, and order with reference to the faculty and administrative desegregation, the vocational plan, the UFP, the Unified Vocational Plan and everything else. I have simply a different view as to the legal effect of a final judgment in the case.

Do some of the parties believe that the order with reference, for example, to faculty desegregation which is almost achieved, just not quite with reference to the black [5] faculty, it's up close

to the 25 percent but not quite, once it's achieved, that there is no longer any obligation on the part of the School Department or the other parties in the case to maintain the percentages that had been ordered by the Court and approved by the Court of Appeals? The objection, of course, is that the courts in cases such as this do not make orders of indefinite duration that would violate the spirit as well as the letter of the Pasadena, California case; but the order with reference to faculty desegregation is key to the availability of black and other minority faculty. The orders that were entered originally were not for the — were not just a figure picked out of the air. The Court with the assistance of the parties found that black and other minority faculty were available to the extent of the percentages set. And those percentages were adopted by the Affirmative Action Plan established by the School Department itself.

Well, I don't want to belabor this point unduly but it's implicit in a number of the filings let's say with reference to other minority faculty that ten percent ratio in some aspects was reached in the spring of this year. And did counsel and the parties think that once one of these goals is reached that then automatically the obligations of the parties to desegregate and to operate a desegregated school system in the City of Boston has been eliminated?

Now, one might ask why then did the Court make **[6]** reference to the Department of Implementation if the orders with reference to the Department of Implementation are also for the future as well as the past? The reason is that the Department of Implementation is structural. It's something within the School Department. The language of the so-called closing orders five years ago and the draft order that was sent out to you all last month, when it speaks in terms of the Court-ordered responsibilities of the Department of Implementation is intended to at least incorporate by reference the orders that were

entered back in 1977 when the Department of Implementation was established.

And the mission of the Department is by no means as narrow as suggested in some of the filings that came in last week which speak strictly in terms of the department's being responsible for student assignments and the monitoring of the student assignments. That, of course, has been the principal function of the Department of Implementation but not the only one. The department has been involved in very important aspects about transportation and problems with reference to transportation. The department has been involved in public information and responding to complaints and inquiries from parents and others. The department has also an important role in planning responsibility, planning for the perservation and one would hope the expansion of the desegregation of the Boston Public School System.

[7] So the Court is not today thinking in terms of a last document which is going to succeed all of the orders that have been entered over the last 15 or more years. The Court is looking for an order and contemplating an order that would end its involvement because it's no longer necessary that the Court be involved in facilities planning or faculty desegregation.

You people, and I don't mean just the lawyers, but you parties and representatives of parties who are here know these obligations as well as the Court. And that's evident in the filings.

Let me make one other point and then I want to hear counsel on anything you wish to say, whether you want to take exception to what I have just outlined as the Court's approach to this order or whether you wish to urge adoption of the types of specific orders that you have proposed in your filings. The Court's principal reason for ending its involvement is that we don't have the Court's plan now. The desegregation plan for

student assignments is the Alves-Willie Plan. And I mentioned — Mrs. Guiney's beaming as I mention prior hearings, the sparkplug to one might say behind the development and adoption of the Alves-Willie Control Choice Plan. That's the plan. That's not the Court's plan. And it seems, although the Court rejected efforts to enjoin its implementation, it's the Court's plan in the sense that the Court sees and saw and now sees no inconsistency between the [8] Alves-Willie Plan and the orders that the Court has entered in this case. But it's not the Court's plan. And the Court in my view shouldn't be involved in overseeing and monitoring and second-guessing the authors of the Willie-Alves Plan, both of whom are leading figures in desegregation cases and in designing and implementing desegregation remedies.

So there is a plan and a good plan which will for the first time go into effect in September of this year. Isn't it, therefore, time for the Court to bow out. That's the thinking behind the draft order that I issued. And I now would welcome such comments as counsel wish to make starting off I suppose with plaintiff's counsel. You're the principal counsel here. And will it be Mr. Pressman first or Mr. Atkins?

Mr. Pressman.

MR. PRESSMAN: Your Honor, our proposal, although it proposed new language, is much more consistent with what the Court has articulated than a number of the other approaches in that we saw a number of the obligations that had been imposed as not completed and that they should be completed.

There are a few things that we propose that are not in current orders or the subject of current remedies. I passed out this morning language about funding of the CPC at its fiscal 1990 level until such time as of the UFP is completed.

We saw the two specific orders that Your Honor [9] included in the final judgment as being just what you articulated a moment ago, a structure that provides long-term hedge against

there ever again being substantial racial discrimination in the operation of the school system but without unduly tying the hands of the school system about a particular method of student assignment or particular grade structures or a particular curriculum. And we see the CPC having the same function: an organization that now exists has parents who participate, parents who can be informed about the continuing obligations and can as we've said in our memo be in effect the eyes and the ears of the DI and again being a hedge against there ever again being discrimination.

THE COURT: May I ask, you said you passed something out. I saw what you filed but I have not seen anything today.

(Document handed to the Court.)

THE COURT: Thank you.

MR. PRESSMAN: The kind of provisions that the Court noted in the final judgment and our provision about the CPC are different from the student assignment provisions that the Court of Appeals disapproved. Those were very specific and directed the school system's policy on a long-term basis. These are structural and fit with many, many varieties of policies.

We also in our memo beginning at page 3 refer to **[10]** three issues that have come to our attention during recent 90-day negotiation sessions. The shocking kind of admission that there are not enough books at the high school level for all students to have books to take home to do homework and the information that we received indicating in terms of schools that reported that they were schools — that reported problems of text books, that they were schools that had higher than average concentrations of minority students. And we said in our memo how can it be a surprise that so many high school students can't meet even the minimum kind of low reading level requirement that the school system has proposed if the city doesn't provide the school system enough money for books.

We also refer to curriculum differences at high schools which also would be tied into funding and to the very large proportion of the high school students outside the examination schools, the extraordinary number of one out of eleven who are in the most segregated kind of special education program that the system offers, one out of eleven.

And we propose, knowing that the Court was winding down its involvement, that the Court based on our submissions indicate that those were substantial potential problems of discrimination and request the State Board of Education to investigate them and attempt to resolve them voluntarily or otherwise if indeed they were confirmed.

Beyond that we believe that the language we **[11]** proposed is consistent with the Court's approach articulated this morning. In some instances it updates some of the previous language, for example, regarding the UFP. Since the Court entered the UFP orders, there were further developments regarding the Latin Schools. So that whereas the Court had enjoined those projects subsequent orders allowed the Latin School project to go ahead and it is not completed. And there is an ongoing project at the former Boston Technical School sites to create a new home for the Latin Academy.

There has been an agreement on a level of funding annually for school maintenance which was only covered generally by previous orders so that the Court might consider it appropriate to use some of our language to update some of the previous obligations.

We propose specific language to deal in the future with layoffs and to deal with the progress that has been made increasing the inclusiveness of the faculty and staff. The impact of the Court's findings was that seniority is not at this point a neutral criterion. All persons did not have an equal opportunity to be hired and begin doing the seniority. And we have cited case law to the effect that it will not be appropriate simply to use

strict seniority for layoffs until the effect of the previous violations is dissipated.

We would like the opportunity to comment again after other counsel have made their comments.

[12] THE COURT: Thank you, Mr. Pressman.

Ms. Playter.

MS. PLAYTER: Thank you, Your Honor.

We have made a filing as the Court is aware regarding the faculty and administrator desegregation. And I would ask that the Court accept into evidence our exhibit which have been filed with the Court and with the parties.

THE COURT: Yes. I think I should inquire if anyone has any objection to accepting that as evidence. I think it should be in evidence. It could be authenticated I assume.

MS. PLAYTER: Yes, Your Honor. I believe many of the documents come from the School Department.

THE COURT: Right, Well, there is no objection. And those exhibits are considered received in evidence.

(Documents received in evidence.)

MS. PLAYTER: Thank you, Your Honor.

Your Honor, we feel the Court's guidance is necessary in this area. And the reason that we feel it is necessary is because after speaking with school defendant's counsel and the director of personnel it's our understanding that should that guidance not be forthcoming from this Court the intention is to treat certain of the orders as no longer existent or no longer extant, no longer in effect. And that would seriously affect my clients, Your Honor.

[13] And the reason that would affect them, of course, is that in March, as the Court noted, for the first time in 15 years, and this order has been sought for 15 years, the School Department reached the ten percent Hispanic, Asian and native American staff level for faculty. And that ten percent Hispanic

and native-American staff together with the 25 percent, close to 25 percent black staff makes a 35 percent minority staff. And the school system that, as we have noted in our exhibit, is not 80 percent minority. And we see that really as not a remedy but as a foot in the door. Your Honor started a toehold, if you will, a base for building the equality that my clients have been searching for in this school system. And that is the exhibits that we have presented, particularly the ones from Massachusetts Advocacy Center and as well as from the city-wide Education Counsel show that there is a long way to go. We still have a dropout rate of nearly one out of two Hispanic children never make it between ninth and twelfth grade in the system. That's a devastating loss to the community and the city.

At the examination schools the situation was even worse in the past and the Court acted in response to that in 1985. But without further court action we feel that even those gains will be lost and what we thought was a foothold or a base will be turned into just a footing of clay or quicksand, if you will, because, you know, we saw ten percent in March but we **[14]** won't see it after that if there is not further action by the Court.

In the case of administrators we almost saw it 9.1 percent for category one, 9.9 for all administrators. And in the case of examination schools it's my belief that school defendants hope no one would look.

It's, as the Court has noted, this has been a long struggle for minority children in the system and that includes my clients. And they have won the right for remedial action. And 15 years of searching for a ten-percent order and 180 months of searching and it's taken two months to possibly dismantle that. And we ask the Court that's not the purpose of this remedy. That was not the purpose of the remedy that we sought, was not a snapshot.

Your Honor, it was a base to build on. And other courts that have struggled with the issue of disengagement have said

that the remedy has to be meaningful, that it has to be that base because once the Court does leave, and that is our concern, Your Honor, with your final judgment, in U.S. vs. Overton or the Riddick (ph.) case, once the Court issues a final judgment jurisdiction is gone. There is no — there are no further orders in certain of the circuits' opinions, certain of the district courts' opinions and that is what — that is our concern, Your Honor. And that is why we feel there does need to be an order both to forestall that kind of situation **[15]** and because of school defendants attention here, school defendants have shown themselves capable of desegregating their staff with force to at least for Hispanic and other minorities.

And I would particularly draw the Court's attention to page six, footnote seven, showing that when there is an order, they act affirmatively. Although they could have done more, they forget about it and threaten contempt and then they act again. And they can recruit. And they can hirer. And they can reach the percentages. And there are people out there to be hired but they have to work at it. And when they're not ordered to work at it, as we have seen in 1978 and 1980 and 1985 and after 1985, they don't do it. And that is another reason why the guidance of this Court is so important in this area.

And similar to plaintiffs we argue that the Court of Appeals has found the ten percent staff desegregation figure reasonable. It's found that my clients are entitled to remedy. And it has noted that this Court should consider the impermissible continued effects of racial and neutral policies in evaluating the extent of a remedy.

And here the factors that we have discussed in our brief and that have been presented in the exhibits indicate that further clarification, if you will, Your Honor, is necessary in this area. And we suggest that really to build that base, to have that base that is the real purpose of the **[16]** remedy, the school defendants need to understand that this order is in effect until those impermissible effects are eradicated from this system.

Thank you very much.

(Ms. Gertner stood.)

THE COURT: I am not going to go in the way you're sitting. I am doing it more — Miss Gertner, I want to hear from you, of course —

MS. GERTNER: Thank you.

THE COURT: — but I want to hear from Mr. Dinger next for the principal defendants. You're representing the intervenor and so forth. First Mr. Dinger. Then Mr. Blumenthal, Mr. Perlmutter, Mr. Dwyer and Mr. Coleman.

MR. DINGER: Thank you, Your Honor.

Your Honor, all counsel I think have operated under a misunderstanding of what the Court intended to do and the filings reflect a perception that this Court was going to do something which is common in desegregation cases upon a finding of unitary status has been achieved. It is not uncommon for district courts supervising desegregation remedies to vacate all outstanding orders and return the conduct of the public education back to public officials upon achieving the unitary status.

THE COURT: I don't say you're wrong but where do you find the word "vacatur"?

[17] MR. DINGER: It was a desegregation case, Your Honor. And I honestly can't remember which one it was but my Latin isn't good enough to make that up.

And although nobody asked you to enter a vacatur or a vacatur judgment, I think counsel anticipated that that is what the Court had in mind and hence the filings that the Court made. If that is not what the Court had in mind, then much of what we all said it seems to me is beside the point but there remains a number of issues that seem to me the Court needs to address.

The most important issue, Your Honor, is affirmative action. As the filings made clear and as the papers have made clear,

the school system is facing a financial situation that unless it changes dramatically and very quickly will require the termination of some faculty. And it is of critical importance that the school system understand how those layoffs are to take place.

Now, I think that the Court's comments have made it clear that as regards those affirmative action goals which have not been achieved, then we are to stay the course. There is some confusion perhaps would be the best word as to what compliance with those orders means in a layoff mode.

The school system has understood paragraph five of the 1985 final orders to require the achievement of the one half of one percent increase in the percentage of black faculty **[18]** to apply in times of hiring and in times of layoff. Other counsel has suggested to me that they understand those orders to require solely a maintenance of existing percentages when the system is in a layoff mode. And it is important for us to understand what our obligations are in that context.

A second issue for which we require clarification was one raised by Miss Playter. We have achieved at least with regard to faculties the ten percent figure for other minority staff. We saw the Court of Appeals' opinion in 1987 which says that "Once these goals," referring to the affirmative action goals approved by this Court, "have been adequately reached, the District Court's role in the school's personnel policies will end. And we are confident the Court will recognize its responsibility to terminate the injunction."

And, Your Honor, I am reading that from 831 F.2d at page 329.

Now, there is some ambiguity in language as well, Your Honor. It could mean on the one hand that as each goal gets satisfied the obligation to maintain which is set forth in this Court's 1985 order disappears or that this Court is required to vacate that portion of the order. It is also possible that that

language means the Court of Appeals expects that the maintained language can be kept in and adhered to by the school system until all of the goals have been satisfied and then they all disappear as part of a final order.

[19] But we need, since we are facing a need right now to decide who ultimately is going to have to be laid off, that is another issue as to which we need the clarification of this Court. That is the most important issue. I wish to touch briefly upon a couple of other issues that are raised primarily in the filings of the other parties.

The plaintiffs advance in argument in their brief to the effect that paragraph one of this Court's 1985 final orders, the permanent injunction against discrimination on the basis of race is an injunction to not only to obey the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution but also incorporates without making reference to them all of the regulatory standards that have been developed by the federal government under 506 of the 1964 Civil Rights Act. That has never been our understanding. And I suggest that it has never been the understanding of anybody in this courtroom until the plaintiffs raised that in their memorandum.

I suggest the law of the case is that paragraph one refers only to the Constitution. And I refer the Court back to the proceedings that we had last year with regard to the Control Choice Plan. Those proceedings were a challenge under paragraph one of the 1985 final order. And I suggest the Court made its understanding clear that that was a constitutional standard. That is how the issue was briefed. **[20]** That is how I suggest it was decided.

And, finally, Your Honor, on the issue of CPC funding, this becomes I suppose less important since the Court is not about, apparently not about to enter a vacatur order; but the Court will remember a number of years ago there was an agreement among the parties that was reflected in the Court order

that guaranteed the CPC funding for a period of three years. Those three years expired a year or two ago, I'm not entirely sure. I think it was two years ago. Funding has been maintained since. I suggest that raising the issue of CPC funding at this point, plaintiffs are raising an issue which doesn't really exist and does not require any kind of Court intervention at this point.

Your Honor, I may have other comments in light of what the other parties say but that is my presentation now.

THE COURT: Thank you. Mr. Perlmutter, I suppose you comment and then Mr. Blumenthal.

MR. PERLMUTTER: Yes, Your Honor. We have reviewed the various proposals of the parties. And I think that we are operating under the same misimpression that Mr. Dinger alluded to for others about the Court's intent.

With regard to the Unified Facilities Plan that, we said in our filing I think that we have, you know, no problem with that. It would be implicitly or explicitly and if it's implicitly, that's fine. We along with the other joint **[21]** planners have been complying with that over the years. And it is the full intention to continue to comply with the Unified Facilities Plan in accordance with its terms.

With regard to faculty and staff which is the most sensitive issue at this time, Mr. Dinger has raised a couple of points of clarification. And I think it would be helpful for all the parties and we would welcome the clarification on those matters as well. That we feel quite strongly that the School Department obviously is going to continue to achieve to meet their obligation under the Fourteenth Amendment and that includes their obligation with regard to the faculty and staff order.

There was some comments in the union's, teacher union's filings that I'd like to address just very briefly. Obviously in these times of when there may be layoffs, it's a very difficult time. It's a difficult time for everyone involved in the Boston School System. And the Court has faced these types of problems

several times in the past. And on each occasion has taken the wise course in recognizing what the rights are for everyone in this case. Nobody has ever suggested this case is really the full employment act for everybody. We all know this case is limited to what the issues in the complaint raised and the remedy that this Court has ordered.

If there are to be layoffs this year, there is **[22]** precedent that was litigated some years ago which I think the School Department has recognized in their filings as to what their obligations are. They feel they have to follow that obligation. The argument of the teachers' union that there should be more money so nobody has to be laid off, of course, everybody would like to have no layoffs but unfortunately we all operate in the real world. And we don't always have everything we'd like to have.

The union's suggestion on that matter really is something beyond the jurisdiction of this Court because this is not a case about seniority rights, Your Honor. It's only a case about the rights of black children and their parents that were violated in the Boston Public School System. So that union's argument is really something that even if the Court was inclined to entertain that argument, and if it is, I think we probably would need an evidentary hearing, a quite complicated evidentiary hearing on that matter; but even if the Court was inclined to entertain that suggestion, it's a matter that this Court doesn't have jurisdiction over.

What the union is saying is give us more money so none of our members have to be laid off. That's not what this case is about. It's not something that the Court would have any jurisdiction over.

With regard to plaintiffs' comments with regard to how close in the system, I think that is a real concern for my **[23]** client. And there is a lot of antidotal stories that you hear about that, some of which are such things as there are books

that are sitting in boxes in many schools that aren't being distributed for one reason or another. Now, I am the first to say that's antidotal evidence but I think that the suggestion that the State Board wants to investigate, you know, voluntarily the situation, that's something we don't have any problem with at all. I think that if books are not being distributed the way they should be distributed, that's something that should be taken care of. I think we agree with the plaintiffs it's not a matter for the Court to order but it is something perhaps the State Board voluntarily could look into.

Also I think Your Honor's comment at the beginning raised one issue, technical, legal issue in my mind. And that is if the Court, it's implicit in the Court's draft final judgment is that the outstanding orders will stay in effect and there will be an obligation to comply with those orders, what does that mean for the paragraph eight modification procedure? Because after the entry of final orders, we really have two classes of orders in this case. We had the final orders, very specific orders that were not subject to the modification procedure; and then you have all the other orders which the Court said in its final order that if the School Department desired to modify those orders, there was a procedure it had to **[23]** follow. And that procedure has been implemented on a number of occasions over the last — since 1985.

So if the Court's intent that all of its orders are to remain in effect and that's implicit in the final judgment, does that apply to the orders that were subject to modification procedure or not or is the Court saying that the orders specified in the final orders are to remain in effect and that the orders not so specified are to be vacated or continue to be subject to the modification procedure? I think that's something we all would need some clarification on.

Thank you, Your Honor.

THE COURT: Thank you. Your comments are very helpful.

Mr. Blumenthal, are you going to speak for the state?

MR. BLUMENTHAL: Yes, Your Honor. The State Board appreciates the clarification that the Court provided at the beginning of the hearing regarding the Court's intent not to walk away from the goals that had been established and remain outstanding in this case. Counsel for the State Board also appreciates the Court's comment on vacatur. And I'm glad to find I'm not the only one who had to go to Black's Law Dictionary to get my bearings.

THE COURT: Let me ask you, though, please, you heard Mr. Dinger's suggestion and perhaps point in some others, **[24]** that unless the Court specifies now and particularizes all the orders still outstanding, whether or not it does that, once the Court enters a final judgment in the case there is no longer any obligation on the School Department. Is that your understanding of the Overton or other cases?

MR. BLUMENTHAL: I don't think there has really been a consistent understanding that can be applied, Your Honor. And I think that our recent experience in light of the final orders as they related to the South Boston High School faculty issue is a good illustration of how clarity may be helpful if not necessarily required under a precedent to give us some direction in the future when we can't return to the Court for guidance on some of these points.

The 90-day process issue that Mr. Perlmutter raised being another example. My notes from the hearing of April 10 indicate that Your Honor expressed an intent not to keep the 90-day process in place. However, it would be our fear that to simply file the final judgment in the form proposed by the Court will leave that question open and we would again be thrust upon the memory of counsel regarding what the Court's intent was in one hearing.

So I think that in order for the school system to proceed and the parties to proceed in the most efficient manner, it may

be helpful to attempt to address those areas of the case through specific identification of what remains **[26]** outstanding which really takes us to a very limited number of issues I believe.

If I could say at this point regarding the issues that the plaintiffs raised which haven't been the subject of specific orders on the high school curriculum and text books and on the substantially separate special education placements, the State Board has no objection to pursuing an approach along the lines that plaintiffs suggested. We recently created what we call an urban monitoring team for the school districts of Boston and Chelsea. It's under the direction of Dr. Charles Glenn who the Court knows from his efforts in this matter. And as part of that team's charge, they're going to be reviewing a plan for secondary education that the School Committee has made a commitment to adopt by the fall of this year and that the State Board has indicated it seeks to review by January of 1991 before it extends the one-year authorization for the Alves-Willie Plan at all grade levels. So it fits in very easily with our timetable to address plaintiffs' issues. I wanted to indicate that to the parties and to the Court this morning.

As I have said, those are not issues that are specific subjects of the Court orders at the present time. And I belileve that the parties through their perhaps only partial understanding of the Court's intent have endeavored to identify the narrow issues. And perhaps regarding issues of true **[27]** disagreements staffing is the critical point. We would agree with the Court the staffing goals are not to be subject to a game of tag or once someone touches them it suddenly creates an aura of compliance and you can then walk away, wander off the base if you will and not be subject to any redress.

We feel that the staffing orders do have to be maintained because if they're not maintained we do not eliminate the vestiges of discrimination that occurred in the Boston Public Schools. We have provided in that spirit what we consider to

be a proposal that looks narrowly on the issue in terms of the way the Court has approached it in the past that endeavors to retain the approach that's been reflected in previous orders of the Court, most specifically the 1981 orders that were entered by this Court and that were endorsed by the First Circuit in the case that Your Honor mentioned earlier that I believe it was the 671 F.2d 23, if I'm not mistaken.

This is one approach that the Court may consider that we think would be extremely helpful to erase the kind of doubts and confusion that I spoke about a moment ago that might arise from something simply labeled a final judgment. We do think that it will be important that the Court clarify the basis for such an order. And we think that the basis is quite evident when you look at the filings that were made by plaintiffs and plaintiff intervenors.

And I think two particular points should be noted **[28]** in support of an order along the lines the State Board proposes. One is that progress has been made and has continued to be made. And contrary to the suggestion in the BTU filing it is not impossible to continue to proceed in the direction that the Court has identified and the First Circuit has endorsed regarding black faculty, other minority administrators where those goals haven't been met and the faculties at the individual examination schools.

And I think secondly the evidence will show the significant effect that treating the goals as simply a game of tag, if you will, and allowing any reductions in force to occur by seniority would have on the Boston Pubic Schools. So we think that those are some important factual bases to establish and probably should be established this morning. And we would simply urge the Court to craft its final judgment in light of those concerns.

THE COURT: Now, are you the only one that will be speaking on behalf of the state?

MR. BLUMENTHAL: I believe I will — Attorney Rodriguez from the Attorney Generals Office is present sitting in the corner but I will be speaking for the state.

THE COURT: Yes. Well, unless there is anyone further on behalf of the state, I will now ask for Mr. Dwyer and Mr. Coleman to make their statements.

MR. DWYER: Thank you.

[29] THE COURT: You wound up in the isolated position you might say at least thus far. Maybe Mr. Coleman will support you.

MR. DWYER: I want to join with the chorus that you have heard this morning as it relates to my understanding of what the Court had intended in proposing to enter a final judgment.

In the First Circuit's opinion, Your Honor, which was something that Mr. Blumenthal just said about whether we treat these percentages as a game of tag and which once you touch the base you're free to wander off, I don't think it's a question here of whether or not we are playing tag with the base so much as it is the question of whether the Court has the power to continue its involvement in the case beyond the entry of the final judgment.

The final judgment that Your Honor circulated is fine as far as the teachers' union is concerned in the format which Your Honor wished to enter it. Our understanding, of course, was completely different about what the underlying effect of such an order would have. I point Your Honor's attention to Page 329 again of that decision that Mr. Dinger referred you to, the First Circuit's case, which made a point that once the goals have been adequately reached the District Court's role in personal policies will end. And then the Court will recognize its responsibility to terminate the injunction. **[30]** I point out that language, Your Honor, because to us it seems to be a question of the Court's power to continue its involvement in the system after the entry of the final judgment. It may not be Your Honor's

intention to enter a final judgment after hearing from the parties in the case; but I do think that if you enter a final judgment, the final judgment signals termination because it is premised on the determination it seems to me that we have achieved maximum practical desegregation.

Now, when we were here I think on the 18th of May it was that very ruling that Your Honor made, that there has been an effort on the part of the parties and the school defendants to carry out the Court's order. There has been substantial compliance and those orders have been carried out to the maximum extent practicable. It was, therefore, in light of those comments that we felt the entry of a final judgment would signal the termination of those orders.

THE COURT: Are you aware of any precedent for your view of that?

MR. DWYER: Your Honor, I must contest there was certain unfamiliarity with the case you mentioned this morning but I am looking at that First Circuit language. And in the portion that has been quoted by Mr. Dinger and myself, there is a footnote in which the Court says, "Although nothing in the order of disengagement," and we're talking now or the Court was **[31]** talking at that point about —

THE COURT: What footnote? I've got the case here.

MR. DWYER: Footnote 35, Your Honor.

THE COURT: All right.

MR. DWYER: It appears again on page 329. "Although nothing in the orders of disengagement specifically provide for the Court's terminating jurisdiction over particular aspects of the schools as compared to the entire system, upon a showing of unitary status we have no doubt that the BTU or any defendant demonstrated complete compliance with all outstanding faculty orders (ph.), the Court would withdraw entirely from the school staffing determinations."

Now, if Your Honor enters an order that is denominated as a final order and does not specifically say the School Department must consistently into the future maintain a 25 percent black faculty ratio, then it seems to me the Court has not withdrawn entirely from the school staffing decisions. And yet on the other hand if the Court does enter such an order and requires in perpetuity that the school defendants maintain a particular ratio, then it seems to me to constitute the sort of perpetual order that the First Circuit found unwarranted in its decision in 1987 concerning student assignments.

I think the Court's choice is to enter a final order and make a determination as to whether we have achieved **[32]** unitary status, make its decision about whether to enter that final judgment in light of whether we've achieved unitary status but not to enter a final judgment that constitutes a perpetual injunction as it relates to the maintenance of these particular —

THE COURT: Let me just interject if I may because you might have missed one point I endeavored to make earlier. It would never be permanent. I mentioned Pasadena, California. It would only — the 25 percent requirement would only be in effect as long as the population of the City of Boston was the same or a greater percentage black as it was when the order was first entered. The order was not entered as I mentioned earlier just taking the figures out of the air. The black percentage of the Boston population when the Court's first order of 20 percent was entered was something like 19.7 percent. Then when the Court entered the order with reference to 25 percent and the School Committee adopted that figure the percentage of black population in the City of Boston had risen to 22.7 or 24.8, something of that nature. So we are not talking in terms of indefinite future. We are talking only in terms of the survival of the predicate of the orders. It's a small point but I didn't want to —

MR. DWYER: I agree —

THE COURT: — overlook that.

MR. DWYER: I agree with the Court that there is **[33]** final orders. And understanding that there was a built-in term on this point. In fact, the Court of Appeals noted that in its opinion and overruled the BTU's objection and appealed that in 1987. And the containment of the 25 percent ratio was a built-in point for Court responsibility.

So as I understand Your Honor's final order in light of your comments, if you continue the 25 percent ratio my understanding in light of what the Appeals Court has said is that once we hit that 25 percent goal the Court's responsibility, meaning I assume the Court's injunction on that point, would end.

THE COURT: What about the responsibility of the parties including the teachers' union? Does that in your view extend beyond what you characterize as the ending of the Court's responsibility? That's the key question here today.

MR. DWYER: I do not believe, Your Honor, that we would have an obligation because I do not believe the order would be in existence at that point. Now, we would have an obligation certainly not to maintain a segregated school system but I do not agree necessarily that there is an automatic linkage between a ratio and the determination that we have a segregated school system. In short what I'm saying is the permanent order suggests that the school defendants be permanently enjoined from maintaining a desegregated school system.

[34] My understanding of that, of course, is simply that they have to obey the commands of the Fourteenth Amendment, not that if we achieve 25 percent and we fell below that percentage in some future year that we would then have to climb back up to that percentage point because as the Court of Appeals has indicated the Court's determination on whether or not these sorts of percentages must continue is a practical, not a theoretical, requirement.

In Mr. Doherty's affidavit, Your Honor, we disagree with the school defendants and the other parties in the case about whether or not it is practical in light of the growing shortage of the minority teachers to expect that we reach this 25 percent goal.

I point out to Your Honor that it is my understanding that in 1981 we had approximately 19.9 percent black faculty. And in nine years we have only been able to increase that up to the present level of 23.84. During that period of time there has been no finding or no indication of record that the school defendants have obstructed compliance with that order. In fact, Mr. Monteiro's memorandum indicates I suggest that the inability to make additional progress towards the achievement of that order is directly linked to the growing shortage of minority faculty that is available for hiring. A shortage which the memorandum indicates will get worse over the next five to seven years.

[35]

(Laughter and comments from the audience.)

MR. DWYER: I suggest to Your Honor, therefore, that the final judgment ends the Court's responsibility to continue and this percentage ought to end, ought to end at that point.

There is an additional point, Your Honor, and that is the South Boston High. We originally came into court filing a motion with respect to South Boston High. We would ask that the last — that we put over determination with respect to South Boston High until today. And you indicated you would expand the scope of the hearing on South Boston High to reach this issue. I'd like to stand on my filings with respect to South Boston High and renew the request that if there be layoffs conducted that South Boston High School not be exempted in any way from those layoffs.

Thank you, Your Honor.

THE COURT: Thank you. Mr. Coleman.

MR. COLEMAN: Yes, Your Honor. Basically the Boston Association of School Administrators and Supervisors agrees with the position taken by the teachers' union. As a union that developed from the seniority system, we believe that seniority is the best way to protect all the members of the organization over the long term.

We are in a different position, however, than the teachers' union at the present time because a number of years **[36]** ago based on negotiations with the School Committee agreed to adopt the Affirmative Action Plan of the School Committee which they adopted in 1984. And in my response to an inquiry from Miss Playter I pointed that out to her. And in her filings she included my letter and then misstated our position.

And I just wanted to clarify it to the Court that the Affirmative Action Plan as we read it includes a layoff provision similar to the outstanding Court orders and that is what I pointed out in my letter. So we are bound not only by your present court order but we are bound by a commitment to the Affirmative Action Plan. And maybe I misunderstand that plan. I understand that not everybody in the School Department understands it in the same way. And I am not sure just how it will be implemented but at the present it is our position that we are bound by your order and by the Affirmative Action Plan in the School Department.

THE COURT: Thank you. Before calling on Miss Gertner, I said once before that the comments of Mr. Dinger and Mr. Blumenthal are helpful. The same applies to your comments, Mr. Dwyer, I would not say that they are not helpful.

Miss Gertner, I think you are next.

MS. GERTNER: Yes, Your Honor. I will be brief. One of the advantages of coming into this case episodically is that you have the obligation to read everything that has gone **[37]** on from the beginning and have it at the tip of one's tongue.

And there is it seems to me a lesson to be learned from the misinterpretation that the parties obviously had of the Court's intention. And that lesson to be learned is how thin the layer of the unit of desegregation is in the system and how quickly some of the parties will at least interpret that they have a right to flee from those obligations. And that I think is a very telling demonstration of the importance of the Court putting in place orders that are more precise than the orders the Court had in mind and the orders which embodied the previous orders.

To say that compliance with the goals of this Court's orders is achieved by simply the injunction that you outlined or that compliance is achieved at the moment that there is a 25 percent faculty hiring it seems to me would undo not only the work of the past 15 years but really undo the Court's findings. You made complex integrated findings that said that there was discrimination in the school system with respect to student assignments, with respect to hiring; that as a result of that the teachers were dissuaded, faculty was dissuaded from applying for positions in the school system because it looked like a desegregated system and students had a particular — this had a particular impact on students.

If there were to be layoffs today to the tune of 795 teachers, it would essentially revert the system back to **[38]** where it was before the Court's order. And to suggest that in this history, in this context after 15 years of this struggle that that wouldn't have the same effect on all of the participants, that black teachers that want to come to Boston wouldn't look at the system and say it's pointless to come to this system, that black students wouldn't have the exact same impact that you were concerned about at the beginning, it seems to me denies reality.

So it's absolutely clear at this point that compliance is really only a few inches thick and that it is not an unending vision that your orders would contemplate, that is to say, in a period of time there would be a group of black teachers and staff in

this school system with sufficient seniority to be able to withstand economic layoffs, to be able to stand the comings and goings of various members of the School Committee. But we haven't achieved that. And now it takes only one bad year or two bad years to undo everything the Court has done. And it's clear that no case required that.

In one sense in effect your orders might read not only thou shall not discriminate but your orders might read maintain a unitary system which is really what in effect we are saying. Maintain a system that doesn't perpetuate the concerns of the past.

Now, in effect the maintaining of a unitary system, though, wouldn't give enough guidance to the parties **[39]** that are flying off in four or five different directions. So that leads to the conclusion that the Court must it seems to me in its final order say unitary system means a certain percentage of black faculty. It means certainly protections against layoffs. And all of that are more than adequately keyed into the elaborate findings that distinguishes this case from almost all of the cases that have come down the pike the past 15 years is the fact that this case was litigated. There were findings. They were very fulsome findings and they more than adequately cover the kind of order that it seems to me the plaintiffs have been asking for.

So I just — I tried to envision what the moment would be if we all walked out of this courtroom with an order that the School Committee interpreted as not requiring maintenance during layoffs. And as far as I think all the parties are concerned, that would be a system — a situation that would be only marginally better than the situation that this Court confronted in 1975. And it can't be that the Supreme Court is saying that.

(Applause.)

THE COURT: That's why I said this is helpful, you see. And there is no applause necessary.

Now, there are counsel who may wish to address the Court who are not sitting at table. I notice, for example, Mr. Rooney (ph.) is here. He has written to the Court on **[40]** behalf of the Alumni Association, Boston Latin School. You're here but I gather that you do not intend to address the Court.

MR. ROONEY: That's true, Your Honor. I will rely on our filings.

THE COURT: Fine. Let me now then, unless there is someone else who wants to address the Court, I'll get back to plaintiffs' counsel. Mr. Pressman. Excuse me. Mr. Dinger has something to say.

MR. DINGER: Your Honor, just very briefly, partly in response to Miss Gertner's comments that the record should be clear that the School Committee is not here today trying to escape from its responsibilities under this Court's order. We are here today trying to preserve as much of those orders which are consistent with the School Committee's Affirmative Action policy as we can given the uncertainties that face any maintenance of the affirmative action order beyond the issuing of the goals in a higher court than this.

The dilemma that the school systems faces, Your Honor, is that if you enter a broad order and you are wrong in the sense that some Court of Appeals or the Supreme Court of the United States concludes that your order was incorrect but in the meantime the School System has laid off people in reliance of it, several years down the road we may face a back pay liability that will take even more resources from the system which already has inadequate resources. And that is why **[41]** we are concerned about getting clarity and getting that order, whatever it is, reviewed as quickly as possible so that we don't have a situation down the road which is far worse than the situation we face today.

THE COURT: Let me ask you one question. You might know more than any of the rest of us about the prospects of layoffs. We read so many conflicting estimates.

Have you some recent information as to the likelihood of layoffs and the number that they are apt to be and so forth?

MR. DINGER: I can shed some light on it and I think there are people in the courtroom that can shed additional light on it, Your Honor. The layoff notices that were sent out reflect a, between seven and eight hundred, reflect a larger number than the number of layoffs that we anticipate. I believe at the present it is anticipated that there will be layoffs on the order of about three hundred.

The reason that additional notices were sent off is frankly we weren't sure how they were to occur. Accordingly the School Department went through all of the conceivable scenarios and sent layoff notices to everyone who under any model of layoffs could conceivably be laid off.

We need guidance in very short term as to what the ground rules are for those layoffs so that we can decide who really is getting laid off and who isn't.

[42] THE COURT: And when are those decisions due to be made?

MR. DINGER: I ask Mr. Monteiro to come here with an answer to exactly that question.

MR. MONTEIRO: What is the question?

MR. DINGER: The question is when do you have to know. Why don't you tell the Court what the timetable is.

THE COURT: Yes. That I'd appreciate. What's the approximately timetable for implementing such layoffs as will be required.

MR. MONTEIRO: Your Honor, if layoffs are to be made, the School Committee must make that decision in my professional opinion during the month of July at the latest. There are a number of personnel procedures that must be followed, some immediately, the teacher transfer process which generally occurs by the end of June, the re-assignment of teachers which generally occurs during the second and third weeks of August

and the rehiring of provisional teachers which generally occur before September 1.

THE COURT: Let me just, do you agree with the estimate that I know is just that, not a precise figure, that approximately three hundred is now the figure that is likely?

MR. MONTEIRO: That would be my professional opinion.

THE COURT: That's also your opinion?

[43] MR. MONTEIRO: Yes.

THE COURT: I know it's a forecast but it's in that vicinity.

Let me ask you one other question since you're here and since I don't know the answer. I read in one of the filings that state law permits the waiver of certification for only three years but there may not be a provisional teacher rehired for a fourth year. Is that your understanding also?

MR. MONTEIRO: Your Honor, my understanding is that the State Department of Education has allowed us to pursue waivers of certification for as many years as is necessary for a teacher to fulfill the certification requirements, especially in the area of languages and special education.

THE COURT: So it is not that three-year ceiling as far as you understand?

MR. MONTEIRO: Your Honor, the three-year ceiling in regular education is primarily a School Department policy.

THE COURT: I see. So it's within the department to decide whether there might be exceptions on some circumstances?

MR. MONTEIRO: That's correct.

THE COURT: Well, if you've got anything else that you wish to add, I'd be happy to hear it but that answers the questions I had.

MR. MONTEIRO: Okay.

[44] THE COURT: Thank you. Now, Mr. Pressman.

MR. PRESSMAN: Your Honor, three types of issues have been addressed this morning.

One type of issue was that there are certain remedies, many of which have been approved on appeal that are not complete. The UFP process is not complete. The 25 percent black faculty and ten percent other minority administrators have not been achieved. The faculty requirements for the examination schools in the order have not been achieved.

As one looks at the different cases in the circuits that have grappled with what courts do as these cases wind down there are no decisions that say that remedies that are not yet complete are to be terminated. Basically all those cases when they start to talk about unitary status look to see whether all the remedies are complete.

So that the Court's understanding that these remedies would be completed and the understanding we expressed and some of the other parties expressed in filings is totally consistent with the law that has been developed.

Furthermore, we cited, and I believe the state also, decisions in the Fifth and Eleventh Circuits that have established the standard of requiring that once a remedy like these that I have mentioned has been completed, that compliance be continued for at least three years.

A second thing that has been discussed is that the **[45]** question of seniority and whether in this school system it's a racially neutral criterion. We believe demonstrated in our submission at some length that under the Court's initial filings, and Miss Gertner alluded to this, seniority is not in this school system a racially neutral criterion. We have set forth some facts in our memorandum. And they show that if you look at the seniority of the different teachers within the different subject areas that before the Court's remedies began one sees a pattern of high disproportionality among the white teachers and one sees a totally different pattern after the remedies began in 1974 and 1975.

And we've set out in our memorandum case law from the Supreme Court and the Circuits and the First Circuit in this very case which established the principle that using a racially neutral criterion which perpetuates prior discrimination is intentional discrimination and none of the parties here — all the parties are in agreement that this school system cannot engage in intentional discrimination in the future.

So that in this second area if one looks at the established case law it will not be permissible to use seniority, strict seniority with regard to faculties and administrators until such time as the violations which the Court found no longer skew the process in a layoff situation.

And the Court of Appeals in the 831 F.2d decision **[46]** didn't have any facts before it about impending layoffs and can't be deemed to have set aside Supreme Court and other case law that you can't use racially neutral criteria which perpetuate past discrimination. And, in fact, on the very same page of the opinion where the Court made the comments about orders not being permanent it — in it's discussion of general legal principles, this is 831 F.2d at 329, wrote "Thus the fact that a particular school policy or program may be racially neutral and that it no longer reflects discriminatory animus does not prove that the effects of prior discrimination had been purged."

So we see it as totally consistent with the First Circuit decision and the controlling case law to have a provision like the one we suggested that applies to the future and doesn't permit strict seniority to be used in layoff situations so long as it would perpetuate discrimination.

Now, the third type —

THE COURT: May I just ask you, you used a phrase that you have used a couple times in the submission. And that was you spoke about skewing the ratios and skewing. What do you mean by "skewing"?

MR. PRESSMAN: What we mean is that if a factor like discrimination had not had an impact on the distribution of seniority among the different personnel by racial and ethnic group would expect that in layoffs if you laid off 100 **[47]** persons, that in that 100 persons laid off would be about, of each group about the same percentage as each group was to the total pool. But basically the effect of the discrimination is that the black and other minority personnel didn't have the same opportunity before a certain time to begin building seniority.

So basically there would not be that skewing at such point that layoffs by seniority would produce a pool of those laid off about matching the total pool.

THE COURT: Thank you.

MR. PRESSMAN: The third type of provision that's been discussed are what the Court described as structural, namely, a general injunction, maintaining the DI, we add maintaining the CPC, that are a hedge against discrimination ever occurring again but do not dictate how the school system carries out policies, don't dictate a particular kind of student assignment or curriculum. And there we believe that the final dye is not cast in terms of the circuit's — in terms of the Court's ability to leave things like that in place even after specific remedies are complete. But we see those as totally consistent with some general statements that have been made about the Fourteenth Amendment.

The Supreme Court has said more than once that the core purpose of the Fourteenth Amendment was to end racial discrimination. In the desegregation case Alexander vs. Holmes **[48]** County Board of Education which is 396 U.S. which we cited, the — no, I'm sorry. We didn't cite it. But it's in 396 U.S., the Supreme Court said that the school system there involved should maintain unitary schools now and hereafter.

Basically if the core purpose of the Fourteenth Amendment is to end racial discrimination, it should be now and hereafter having in place permanently structural provisions which are a hedge against discrimination but don't dictate policy is a balance that should be accepted. So in terms of what the Court saw as structural provisions we see those, see it as proper that those would be permanent.

THE COURT: Do you wish to have the last word, Ms. Playter?

MS. PLAYTER: Briefly, Your Honor, just regarding school defendants' Affirmative Action Policy. After speaking with Mr. Dinger the other day it's my understanding that the Affirmative Action Policy addresses hiring issues and not re-deduction in force issues and the way that the school defendants would interpret it so that its inclusion in the administrators' contract might help reinforce. And I think it's a very good thing that they've done that in terms of hiring but would not effect this situation that we are facing right now without the Court's clarification.

The second thing in terms of the skewing of seniority and its effect, several of the exhibits that we have **[49]** introduced, particularly Exhibits 5 and 11, show the lack of seniority that almost 30 percent of Hispanic teachers have less than four years of seniority. That's permanent teachers as well as 19 percent of the black teachers and only ten percent of the whites have that kind of low seniority. And that is the situation that we are faced with. And that is the situation that we would ask that the Court's clarification address. And we think it's a limited area. It sets the base that we need.

And in faculty desegregation as a core, it's absolutely core to changing the attitudes in this school system and those attitudes have caused so much damage and continue from the figures and the test scores and that we have presented to my clients that this is absolutely central, Your Honor, that this base

be there to build on because we have not defeated and dismantled those racial stereotypes. And the Massachusetts Advocacy exhibits just show that again and again.

And that is why this clarification is so important. And we believe the Court has the basis on the past record of this case, the appeals that have been taken. The guidance of the Court of Appeals does not prevent the Court in any way and, in fact, calls on the Court's good judgment to act until it's necessary to terminate.

Thank you.

THE COURT: Mr. Dinger.

MR. DINGER: Very, very briefly. Miss Playter's **[50]** comments suggested that I probably unintentionally misled her in a telephone conversation. I think the record should make it clear that the Affirmative Action Policy of the school system, a portion of it has been attached to the plaintiffs' filing. Also it adopts as a policy of the school system of the School Committee's, and I'm reading now from the policy itself, "To the extent permitted by law to effectuate any reduction and recall of staff in academic or non-academic areas in such a fashion as to maintain the then existing aggregate percentage of black and other minority employees."

So the school system has adopted a policy regarding layoffs. And I just wanted the record to reflect that.

THE COURT: Well, thank you.

We will take a morning recess, between 10 and 15 minutes, at this time.

THE CLERK: All rise. Court will now recess for 15 minutes.

(Recess taken.)

THE CLERK: All rise for the Court. Court is open. You may be seated.

MR. ATKINS: Your Honor, may I just be heard for just one very brief statement?

THE COURT: On which point?

MR. ATKINS: On the point of faculty, the **[51]** statement that was made earlier that we did not respond to and I believe should be responded to.

THE COURT: Well, only if it's factual.

MR. ATKINS: It is factual. That is precisely the point to which it goes to. The comment was made earlier by counsel for the teachers' union that there is a shortage of black and other minority teachers. I am not sure what city he was talking about but he's not talking about Boston.

The record in this case shows that this Court's order has been at least equaled and in some instances achieved. The very figures he gave of going from 19.1 in 1981 up until 1990, a figure of 23.8 shows that the one-half percent per year standard has been achieved. Hasn't — we have not yet met the precise goal of 25 percent but what it shows is that there has never in any year been a shortage of black teachers for hiring in this school system. And one would think that the attorney who represented the Boston teachers' union of all people should have been aware of that.

THE COURT: Well, thank you.

Let me say in response, you know, on behalf of Mr. Dwyer that the teachers' union, and I have said this dozens of times, a score of times in the course of the litigation, has been cooperative with the goals of the plaintiffs in this case as in any case in the country which I am aware of. The teachers' union I think has many, many times shown cooperation **[52]** and restraint. And I am not going to try to because I couldn't recall all of the instances of the cooperation received from them as well.

So I note the facts that you make but I wouldn't want the wrong conclusion to be drawn. And that is that there has been any lack of support and assistance and cooperation from the teachers' union because there has been. And let that matter go.

You made a point. It's factual but that to me is not one of the critical key problems I must consider today.

I am going to now make a variety of findings to be supplemented not I expect with a memorandum of decision on all of these matters, in fact, perhaps on very few if more than one. But there are matters that are pending. And I have got to rule on them, most of them now, and we will follow them up with a written order.

The first point I want to make is that the Court can be educated in these matters. And I can see now after having heard all of the lawyers that more than what I sent out by way of the draft order as a requirement, it will do what most of you counsel urged and that is particularize in at least some and perhaps several aspects of the case obligations of the parties that will survive the entry of final judgment.

There is further particularization and probably clarification needed and I had that in mind when I said I am aided and assisted by the presentations of counsel here at the **[53]** hearing today.

The Court finds explicitly that there has not been a unitary system achieved in Boston in the Boston Public Schools. Before they are unitary in the sense of desegregated to the extent that vestiges or past discrimination have been eliminated, a good deal remains to be done. That, however, does not in my understanding of the law preclude the Court from entering a final judgment in the case. But in order to clarify the situation the final judgment will be particularized with reference to the Uniform Facility Plan, with reference to the Department of Implementation, with reference to faculty and staff and perhaps one or two other matters.

I want before coming to those points, however, to rule on a couple of other matters which also will be ruled on in writing. The Court heard last month and in a prior hearing, too, an application of the teachers' union to bring South Boston High

School onto the same level and operation with respect to transfers and layoffs as other high schools in the city. We had two hearings on that. The Court will grant that motion of the Boston teachers' union. Why? Because although bringing South Boston High School into the same situation with respect to retention of faculty and staff may cause problems there, there has simply been no showing by the School Department or by any other party that would warrant the extension of the Court orders exempting South Boston High **[54]** School from the regular provisions governing transfer and seniority in South Boston High School and differing it from other schools.

Very briefly the question was whether the Court's orders in 1985 intended to carry forward beyond 1985 the provisions in the comprehensive consent decree that accompanied the Court's termination of the special temporary receivership for South Boston High School. Now, those provisions have gradually been replaced and superceded and the Court as I have heretofore explained did not intend that they go beyond 1985 or even the years that were specified in the consent decree that was entered in years previous to 1985.

The question is whether the Court should now seek to prevent the usual transfer of faculty to and from South Boston High School as is required in other schools in the city. The Court of Appeals addressed this issue after the Court's original orders in that regard and relied extremely heavily on the testimony of then school master Winniger. Mr. Winniger has been transferred to the School Department headquarters and has other respopnsibilities now.

The Court invited the, implicitly certainly invited a showing this spring similar to what was made some years ago when Mr. Winniger was the headmaster there. And indeed it was at the Court's invitation that the new headmaster of South Boston High School attended a hearing. No party **[55]** called her. The Court did not require her attendance, that is, her testimony.

And there has simply been no showing by any party here, despite the Court's having continued the hearing to permit such a showing that the situation there requires the special provisions that had been in effect. And the result of that analysis is the prospective allowance of the motion filed by the teachers' union with reference to South Boston High School.

Secondly, the Court heard counsel with reference to an application for fees by plaintiffs' counsel and you see very voluminous filings and just in the past week received a response from the School Department with reference to the fees applied for by plaintiffs' counsel. I simply am not ready to rule on that today and I will not rule on it today but will as soon as I can.

There were many issues raised with reference to the fees application. And the Court has not had an opportunity yet frankly to review the School Department filing that challenges some of the time spent by plaintiffs' counsel as being unrelated to the case and not being called core representation, representation with respect to core issues in the litigation and acknowledging that some of this application is, however, in the view of the School Department core related.

In the past the Court had the identical question and ruled substantially in favor of the plaintiffs' application **[56]** and, again, although the Court is not prepared to rule today, I can say that in my view the plaintiffs' counsel is certainly between second and third base at least in rounding the bases in establishing their entitlement to further substantial compensation.

I turn now to the matters that were argued today. The Court has been asked to make a provision in the final judgment with reference to the City-wide Parent's Council and its fund and the Court will not do that. That is to say, the CPC is sufficiently well established.

The School Committee as stated by Mr. Dinger is sufficiently committed to enable the Court to observe the timetable on its involvement with the CPC funding that was set back in 1985

where the Court's order in paragraph four said shall fund for at least three years from this date. Of course, it's more than three years now and of course CPC is needed. CPC is needed partly to collaborate and corroborate with reference to the UFP partly to aid in the implementation of the new Willie-Alves Plan and partly to continue the work that they have done so well.

Many of you — I was away. I was out of the country as a matter of fact when the CPC had its 15 anniversary party and I was unable to attend, although I had hoped and originally planned to be there. But as I wrote to Mrs. Henry McInnis (ph.) any doubt that anyone has as to the need and the **[57]** continued need for the work of the CPC and the Boston Public Schools need look only at the letterhead that accompanied the notice of its affair and its 15th anniversary observation. You had two United States senators heading a list of very prominent influential persons in our community who recognized the important and essential role that CPC has played. So there is no undoing of parent participation in the schools of this city, public schools of Boston. The parents have a role that's totally different from what it was when CPC first started. And there is no necessity nor proper occasion in my view for the Court to pattern from the three-year limitation period that it set in the 1985 order.

Next the Court appreciates plaintiffs' counsel having brought to the attention of the Court and the parties, too, the problems of text books and other problems in some of the high schools. But you heard Mr. Blumenthal state, and the Court has no doubt whatever that the State Board of Education without any Court order is going to follow up on that matter as well as officials in the School Deparment itself. And the Court will not include in its final judgment any provision in that respect.

I turn next to the request of El Comite that the percentages of minority, other minority faculty be increased from 15 percent

in some respects and be defined and made more fair to the growing Hispanic and other minority percentage of **[58]** the students in the Boston Public Schools population. We all know that the only segment of the Boston Public Schools that has increased numerically over the years is that of the Hispanic minority segment. And the intervening plaintiffs El Comite and their associate, other minority organizations, today could probably make a valid, persuasive and reasonably sufficient showing that the ten percent figure is too low. The Court does not, however, feel that it can legally or should under the circumstances grant that aspect of El Comite's application. In my understanding of the law such an order would conflict with the Supreme Court decision and the Pasadena, California Spanler (ph.) case where the Court adjusted its orders to reflect demographic changes and geographic changes in the Pasadena School System. The Court found for reasons that were adequate at the time that the ten percent figure was a proper one for desegregation of faculty with Hispanic and other minority students that the finding has been confirmed by our Court of Appeals. And for those reasons the Court does not accept or grant the application of El Comite in that respect.

Similarly, the Court does not adopt plaintiffs' proposal that paragraph one prohibiting discrimination would be violative of the Fourteenth Amendment of the Constitution. It incorporates implicitly or by reference the regulations under Title 6 of the Education Act. Those were regulations which were revised in 1987 in connection with the Civil Rights Act **[59]** passed at that time. And it would be again changing the remedy in this case because of events subsequent to the events that were the basis of the liability determination and the facts that led to the Court's remedial order heretofore entered that would be involved. And the Court without further elaboration accepts the position enunciated by Mr. Dinger here this morning, and that is to say that this case has been tried and its standards of

remedy formulated in terms of the Constitution and it is in my view too late in the game to refine or elaborate those standards in light of the regulations cited by the plaintiff. Those now are the Court's negative findings.

Affirmatively the Court first will incorporate in its final judgment provisions with reference to the Unified Facilities Plan. They are not the subject of dispute. The parties have known their obligations and are willingly carrying out the stipulation that was made under the urging of the parties and the court in this case for more years than we would even be able to remember accurately. That obligation will be included in the final judgment.

Similarly, the reference to the Department of Implementation will be enlarged so as to specify the responsibilities of the Department of Implementation. They are as I said in the course of colloquy to counsel here this morning more than just the assignment of students. Together with the assignments go out the transportation routes. The DI **[60]** also mediates and seeks to resolve disputes with reference to transportation and transportation routes. It's involved in public information activity. It's involved, and in a key fashion, with the planning capabilities and responsibilities, planning now long range for desegregation.

I do not infer from counsel's statements, and I hope no one in this room infers that the School Department and the State Board and the teachers' union and others are just waiting for the Court's involvement to end so they can turn the clock back. There is no imminent threat or movement to undo the gains that have been made over the last years and I think it would be a disservice to the teachers and the students and the parents and the community to make it appear that the moment, in the words of counsel, you touch compliance, that then it's legal or anticipated that responsible officials whether in the Mayor's Office or in the School Committee or State Board or

anywhere are just waiting for the Court to withdraw to turn the clock back. That is not the intent of anyone that I am aware of and it would be so inconsistent with the good faith efforts that all of these parties have brought achieving desegregation that that I think should be stated.

The Court's order under the paragraph one in the Fourteenth Amendment often talks in terms of maintaining desegregation. The object of this case isn't to achieve compliance with Court orders. It's to achieve a permanent **[61]** change in the attitude and outline of officials in the city with reference to difference in race and color and ethnic origin.

I think that's true in all cities seeking to go forward from the Court's order, not to regress.

And I turn next to the Department of Implementation. And I guess I mentioned that already.

Next is the issue raised with respect to paragraph eight. Paragraph eight in the 1985 orders called for a modification procedure granting the school defendants authority to make such changes as they wish to make when not violative of some specific Court order there enumerated provided they went through a certain procedure, a noticed procedure to counsel and an opportunity to be heard and negotiated and then giving the School Department discretion limited only by the provisions of state law. That paragraph will not be included in the final judgment. Why? Because it was part of the machinery for disengaging of the Court.

We have come to that point in my view at this time. And the Court is not and did not in its draft and is not now planning to include paragraph eight or an equivalent to paragraph eight in its final judgment.

I turn now to the most contested and important issue that was addressed this morning. And that has to do with the faculty and administrative staff. I'll write more on this **[62]** topic than I am going to be able to say right now. I will not be writing much

more than what I said already by way of an explanatory memo but with reference to paragraph eight or the Department of Implementation or the Unified Facilities Plan.

But with reference to faculty and administrative staff, it's still not clear to me that apparently the paragraph dealing with that in the 1985 orders needs to be amplified because although the paragraph No. five in the 1985 orders spoke in terms of hiring only, and I'll expand on it in the final judgment, it does state that school defendants shall achieve and maintain a desegregated faculty and administrative staff which are each comprised of not less than 25 percent blacks and ten percent other minorities by increasing and so forth.

I now emphasize the word "maintain." And part of the maintaining of those percentages would be I thought preservation and implementation of the same procedure as was approved by the Court of Appeals back in 1981 where layoffs that would result in a faculty less desegregated but is requiring that paragraph five orders were prohibited.

Speaking presently the Court will in its order adopt the plaintiffs' position here on the basis that was elaborated by Mr. Pressman, namely, that seniority is not a racially neutral criterion in the Boston Public Schools. There were very few black peoples, and what I say about the blacks is **[63]** evenn more true of the Hispanics, other minority people who had tenure when the Court orders with reference to faculty and administrative desegregation were entered.

And as stated in other words by more than one counsel today the basic finding and basis of the Court's granting the application for the plaintiffs and El Comite and the school defendants and others in this respect and Black Teachers Association, is that this is not a teachers case. It's a pupils' case and their parents' case. And when the constitutional rights of the pupils, black and other minority, have come into conflict with the employment expectations and lawful contractual rights of the teachers, it's the latter that has had to yield.

At every turn in this case over the last several years when there has been that conflict it's been the rights of the black pupils and their parents and Hispanics and other minorities that have to prevail. This is not something that is the local preference. This is the law of the land, the Constitution as interpreted by the highest court, the Supreme Court of the United States.

Will the Court's order have an indefinite duration? No. The Court may not make orders of indefinite duration in these cases. They may make orders only that are operative until the vestiges of the discrimination that was unlawful have been removed. And in this instance there is in **[64]** the plaintiffs' submission and there is in the facts that are relevant here a termination point that is obtainable and will be adopted by the Court. And that is its order with reference to maintaining percentages the black minority faculty and what Mr. Dinger called the layoff mode as well as the hiring mode will terminate when layoffs would not in Mr. Pressman's phrase skew the — when seniority will not skew the layoff percentages. I needed some explanation of the meaning of the word skew in that context.

(Laughter.)

THE COURT: When the goal is reached, when sufficient black and other minority faculty and administrative staff have seniority in the Boston Public School System which when layoffs occurred would result in layoffs reflective, if not identical to, the percentage of black and other minority faculty and administrators in the system, then the order with reference to maintaining a desegregated faculty and administrative staff will end.

To repeat, I will try to state this with precision in my written order. Let's assume three hundred layoffs. Let's assume for this purpose 24 percent black, 10 percent other minority faculty.

When layoffs result in a laying off of white faculty to the extent of 65 percent of the layoffs, black to the extent of 25 percent, 24, and Hispanics to the extent of 10, then the Court's order with reference to desegregation of **[65]** faculty and staff will expire on its own terms. A footnote to that order and in perspective of putting it into a written final judgment: Some school systems seek to relate the percentage of minority faculty and administrative staff to the composition of the Public School System. Plaintiffs have never sought that sort of order in this case for a variety of reasons that it would take a whole afternoon to outline.

The minority population of the Boston Public School System is far more than 35 percent. It's far greater than 25 percent black and 10 percent other minority. There are large cities in the United States where courts have been asked and courts have ordered a close relationship between the racial ethnic composition of the faculty and the racial ethnic composition of the student body. Plaintiffs have not sought that. The Court has never entertained that but it's a dimension of the reasonableness of what the plaintiffs had sought in this case to refer to the other cases and those other metropolitan areas.

Now, the faculty, predominantly white, in the Boston public schools has done a vastly better job than has been credited for. We have read for a decade of the failures in the Boston Public School System and so little about the wonderful programs and the tremendous education. Every now and then some school or some teacher or headmaster is recognized for the work done. You've got more dedicated people, and these **[66]** are whites, teachers I'm talking about now, in the education of the children here than anyone ever acknowledges. And education in the Boston Public Schools is, ande I know because I have been a sort of close observer for now so many years, the schools of the city are so much better than they're getting credit for. The reports about them are so uniformly depressing and critical.

I do hope that with the Court out of the case that there will be a new motivation on the part of the School Department and the officials and the School Committee members involved to correct this false impression that it's become sort of an accepted truth in the city that the public school system offers an inferior education. I am positive that's false. I know too many instances of marvelous education and sacrifices and dedication by teachers to work with the parents in the schools of the city. So that's, having mentioned it, but it is another one of the many reasons why the Court feels it's time for the Court to get out. Once the system is on its own so-to-speak without the Court's involvement I think there will be an added reason and motivation to spread the good news about the school system and not just simply the bad news.

Now, before leaving, because that pretty much concludes my statement of the prospective outline of the judgment that I will be entering and the points that I will cover, maybe counsel have in mind some point that I have not **[67]** touched upon that should be addressed in the final judgment or in a further memorandum. I will ask for anyone, plaintiffs or defendants, something that has not really been addressed by the Court that you think should be.

Ms. Playter first and then Mr. Dinger's got something.

MS. PLAYTER: Your Honor, just in terms of the order on the —

THE COURT: One other thing before you speak. I did forget one thing and that is the Court will put in its order something that it omitted from the '85 orders and that had to do with the special faculty desegregation provisions with reference to the examination schools. That was not in the '85 orders. That was added subsequent to the '85 orders by a stipulation and negotiation between the plaintiffs and the School Department. But in the light of the advisability of spelling out more particulars in the, included in the '85 orders, in my draft order I'll cover that as well.

Yes, Ms. Playter. You're next.

MS. PLAYTER: Yes, Your Honor. Thank you. That was one issue.

The other issue, I'd just note that I believe the exhibits and filings show that it has been practicable for the School Department to maintain and increase its minority faculty and administrators. And I think that's an important part of **[68]** this order that there be a finding to that effect. And I believe the exhibits show that when they want to, they can do it.

Thank you.

THE COURT: Thank you. Mr. Dinger.

MR. DINGER: This is a technical point, Your Honor, but I think it is of some importance to the school system, particularly if the Court does not plan to incorporate the procedures set forth in paragraph eight of the 1985 orders. Then whether the Court wishes to call it a vacatur or not, some kind of provision which makes it clear that we are not subject to the orders that are not going to be set forth I suggest would be appropriate to avoid the dispute arising later on in which someone finds an obscure order from 1975 or seven or eight and suggests that since that order has never been vacated we are somehow in contempt of court because we have violated it.

I think the points that, the orders that the Court had identified that it will incorporate into the final judgment cover essentially, at least in my view, all of the areas that are likely to be of ongoing concern in this case. And I just suggest that it's a little more than housekeeping but I hope not a lot more than housekeeping to incorporate a provision such as that.

THE COURT: I certainly will give that plenty of **[69]** consideration.

MR. DINGER: Thank you, Your Honor.

THE COURT: And I guess no one else has anything, so we will now recess.

THE CLERK: All rise, Court will now recess.

(WHEREUPON, the proceedings were recessed at 12:45 p.m.)

CERTIFICATE

I, Carol Lynn Scott, Official Court Reporter and Notary Public in and for the Commonwealth of Massachusetts, do hereby certify that the foregoing transcript is a true and accurate transcription of my stenographic notes taken on May 21, 1990.

/s/ Carol Lynn Scott

Official Court Reporter
204 USPO Courthouse
Boston, MA 02109
(617) 482-3646

APPENDIX H

Reductions In Force - Faculty
By "Scenarios" Data Provided By
Manuel Monteiro, Sr., Manager
Office of Personnel BPS, May 11, 1990

Scenario I — "Maintenance of Desegregation percentages"

	Black	White	Other	
Permanent	3	381	1	
Provisional	145	176	78	
Total:	148	557	79	= 784

Scenario II — "School Defendants Final Judgment Proposal"

	Black	White	Other	
Permanent	3	335	46	
Provisional	145	176	78	
Total:	148	511	124	= 783

Scenario III — "BTU Contract Seniority"

	Black	White	Other	
Permanent	205	141	24	
Provisional	145	176	78	
Total:	350	317	120	= 769

Results for Other Minorities:

I: 17.6% of OM teachers lost: OM teacher population 10.19%
II: 27.6% of OM teachers lost: OM teacher population 9.35%
Iil: 22.7% of OM teachers lost: OM teacher population 9.4%

APPENDIX I

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TALLULAH MORGAN, ET AL., Plaintiffs	)	
v.	)	CIVIL ACTION NO. 72-911-G
DANIEL R. BURKE, ET AL., Defendants	)	

NOTICE OF APPEAL

Notice is hereby given that the Boston Teachers Union, Local 66, AFT, AFL-CIO appeals to the United States Court of Appeals for the First Circuit from the Final Judgment entered in the District Court on May 31, 1990.

For the Intervenor,

BOSTON TEACHERS UNION,
LOCAL 66, AFT, AFL-CIO,
By its Attorney,

Matthew E. Dwyer — BBO #139840
GRADY AND DWYER
Two Center Plaza, Suite 430
Boston, Massachusetts 02108
Tel. (617) 723-9777

Dated: June 21, 1990

APPENDIX J

United States Court of Appeals
FOR THE FIRST CIRCUIT

No. 90-1614

TALLULAH MORGAN, ET AL.,
Plaintiffs, Appellees,
v.
DANIEL R. BURKE, ET AL.,
Defendants, Appellees,

BOSTON TEACHERS UNION LOCAL 66,
Appellant.

JUDGMENT

Entered: February 21, 1991

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: Part (3) of the Final Judgment providing for faculty and staff desegregation is amended by deleting "or more" after "3%" and the judgment of the district court is affirmed as amended.

By the Court:
Francis P. Scigliano
Clerk

APPENDIX K

BOSTON PUBLIC SCHOOLS

OFFICE OF PERSONNEL
MANUEL P. MONTEIRO
Senior Manager

CARLO ABRAMS
Unit Leader, Recruitment
JOHN M. CONLEY
Unit Leader, School Services
EDWARD F. KELLEHER
Unit Leader, Records Management

VICTOR A. McINNIS
Unit Leader, Evalua
ALVIN SHIGGS
Unit Leader, Teacher Placem

March 15, 1990

Dr. Laval S. Wilson
Boston Public Schools
26 Court Street
Boston, MA 02108

Dear Dr. Wilson:

The United States District Court in its Order on Facul Recruiting and Hiring, issued on January 28, 1975, requir the defendants on or before March 15 of each year to file wi the court and all parties a ranking system by which they propo to rank all black applicants for teaching positions, togeth with a report on the numbers of black and white permane and provisional teachers then employed at each level.

In its July 5, 1978 Memorandum and Further Orders Faculty Recruiting and Hiring the United States District Co also ordered that the reports due March 15 and October shall include tables showing:

i. The number and percentages of white, black and other minority teachers in regular, special and bilingual education for the current year and the previous three (3) years.
ii. The number of black, white and other minority first, second and third year provisionals currently employed and provisionals hired for a fourth year;
iii. The number of newly hired provisional teachers for the current year and the previous three (3) years subdivided by subject areas to which assigned;
iv. The number of newly appointed provisional teachers for current year and the previous three (3) years subdivided by subject areas to which assigned.

Enclosed herewith for your processing is the information required by the Court for March, 1990.

Very truly yours,

Manuel P. Monteiro
Senior Manager

MPM/es
enclosure

RANKING SYSTEM FOR BLACK APPLICANTS FOR TEACHING POSITIONS

FOR PERMANENT POSITIONS

Appoint permanently all certified black provisional teachers on or before April 15, 1990 who have/will have completed at least one (1) full year of teachings with satisfactory job performance in the Boston Public Schools. The appointments are to be limited to areas in which we know vacancies are likely to exist.

FOR PROVISIONAL/PERMANENT POSITIONS

Issue provisional contracts to newly recruited certified first year black teachers followed by permanent appointment after ninety (90) days of satisfactory performance.

RECRUITING

Enpower the Recruitment Specialist to offer letters of commitment to available recruits. The letter of commitment will list the effective date of employment pending final approval of Personnel. This will enable the recruiter, during the height of recruitment in the spring and summer, to demonstrate the commitment of the Boston Public Schools to employing black teachers while also addressing the constant problem of recruiting black teachers and losing them to other school systems while awaiting action on their employment by the Department.

TEACHING STAFF — MARCH 15, 1990

HIGH SCHOOLS

	Black	White	Other Minority	Total
Regular Teachers				
Permanent	159	640	27	826
Provisional	19	12	6	37
Temporary	2	3	0	5
Sub Total	180	655	33	868
Vocational Teachers				
Permanent	20	42	5	67
Provisional	4	3	1	8
Temporary	0	0	0	0
Sub Total	24	45	6	75
Bilingual Teachers				
Permanent	19	35	38	92
Provisional	13	3	12	28
Temporary	0	0	1	1
Sub Total	32	38	51	121
Special Education Teachers				
Permanent	38	148	10	196
Provisional	12	7	5	24
Temporary	0	1	0	1
Sub Total	50	156	15	221
Grand Total	286	894	105	1285

TEACHING STAFF — MARCH 15, 1990

MIDDLE SCHOOLS

	Black	White	Other Minority	Total
Regular Teachers				
Permanent	109.5	389.5	10	509
Provisional	14.0	19.0	6	39
Temporary	0	1.0	0	1
Sub Total	123.5	409.5	16	549
Vocational Teachers				
Permanent	0	0	0	0
Provisional	0	0	0	0
Temporary	0	0	0	0
Sub Total	0	0	0	0
Bilingual Teachers				
Permanent	12	23	34	69
Provisional	10	6	15	31
Temporary	0	0	0	0
Sub Total	22	31	49	102
Special Education Teachers				
Permanent	49	103.5	8	160.5
Provisional	17	42	7	66
Temporary	1	1	0	2
Sub Total	67	146.5	15	228.5
Grand Total	212.5	587	80	879.5

TEACHING STAFF — MARCH 15, 1990

ELEMENTARY

	Black	White	Other Minority	Total
Regular Teachers				
Permanent	329.5	820	24	1173.5
Provisional	70	36.5	6	112.5
Temporary	1	3	0	4
Sub Total	400.5	859.5	30	1290
Vocational Teachers				
Permanent	0	0	0	0
Provisional	0	0	0	0
Temporary	0	0	0	0
Sub Total	0	0	0	0
Bilingual Teachers				
Permanent	34	58.5	126	218.5
Provisional	13.5	8.5	40.5	62.5
Temporary	1	1	1	3
Sub Total	48.5	68	167.5	284
Special Education Teachers				
Permanent	56	264	25	345
Provisional	16	71.5	18	105.5
Temporary	0	1	2	3
Sub Total	72	336.5	45	453.5
Grand Total	521	1264	242.5	2027.5

TEACHING STAFF — MARCH 15, 1990

SPECIAL SCHOOLS AND PROGRAMS

	Black	White	Other Minority	Total
Permanent	21	130	10	161
Provisional	5	31	5	41
Temporary	0	2	1	3
Sub Total	26	163	16	205

ITINERANT TEACHERS

	Black	White	Other Minority	Total
Permanent	5.0	20	2	27
Provisional	6.5	.5	3	10
Temporary	0	0	5	0
Sub Total	11.5	20.5	5	37
Grand Total	37.5	183.5	21	242

I. NUMBER AND PERCENT OF WHITE, BLACK AND OTHER MINORITY TEACHERS IN REGULAR, VOCATIONAL, SPECIAL AND BILINGUAL EDUCATION

(See fold-out chart appearing at end of this Petition.)

II. NUMBER OF WHITE, BLACK AND OTHER MINORITY FIRST, SECOND, THIRD, AND FOURTH YEAR (PERMANENT) PROVISIONALS

Year	Black	White	Other Minority	Total
FIRST	86	54	61.5	201.5
SECOND	67	89	35	191
THIRD	46	98	28	172
FOURTH (Permanent)	21	90	14	125
TOTAL	220	331	138.5	689.5

III. NEW PROVISIONAL HIRES BY YEAR 1986-1987 to 1989-1990

	86-87	87-88	88-89	89-90	Total	PERCENT BY AREA
Elementary						
B	35	37	44	27.5	143.5	61.46
W	27	32.5	10.5	5	75	32.12
O	2	4	4	5	15	6.42
T	64	73.5	58.5	37.5	233.5	100.00
Secondary						
B	26	24	23	11	84	39.72
W	35	39	19	11.5	104.5	49.41
O	5	9	3	6	23	10.87
T	66	72	45	28.5	211.5	100.00

III. NEW PROVISIONAL HIRES BY YEAR
1986-1987 to 1989-1990 (cont.)

	86-87	87-88	88-89	89-90	Total	PERCENT BY AREA
Art						
B	6	3	3	0	12	41.38
W	6	7	0	0	13	44.83
O	1	1	1	1	4	13.79
T	13	11	4	1	29	100.00
Home Economics						
B	0	0	2	0	2	66.67
W	0	1	0	0	1	33.33
O	0	0	0	0	0	
T	0	1	2	0	3	100.00
Industrial Arts						
B	0	1	0	0	1	50.00
W	1	0	0	0	1	50.00
O	0	0	0	0	0	
T	1	1	0	0	2	100.00
Vocational Education						
B	1	2	1	3	7	43.75
W	3	4	0	1	8	50.00
O	0	0	0	1	1	6.25
T	4	6	1	5	16	100.00
Music						
B	2	1	5	1	9	47.36
W	3	1	4	0	8	42.11
O	0	1	1	0	2	10.53
T	5	3	10	1	19	100.00

III. NEW PROVISIONAL HIRES BY YEAR
1986-1987 to 1989-1990 (cont.)

	86-87	87-88	88-89	89-90	Total	PERCENT BY AREA
Physical Education						
B	3	5	8	2	18	66.67
W	2	1	2	1	6	22.22
O	2	1	0	0	3	11.11
T	7	7	10	3	27	100.00
Bilingual						
B	16	11	9	13.5	49.5	22.81
W	24.5	13	8.5	6.5	52.5	24.19
O	23.5	34	25	32.5	115	53.00
T	64	58	42.5	52.5	217	100.00
Special Education						
B	16	16	21	28	81	19.73
W	78.5	90	77	29	274.5	66.87
O	11	18	10	16	55	13.40
T	105.5	124	108	73	410.5	100.00
Funded*	*	*	*	*		
B						
W						
O						
T						

*included in subject/grade areas

GRAND TOTALS						
B	105	100	116	86	407	34.83
W	180	188.5	121	54	543.5	46.51
O	44.5	68	44	61.5	218	18.66
T	329.5	356.5	281	201.5	1168.5	100.00

iii. NEWLY APPOINTED PERMANENT BLACK, WHITE AND OTHER MINORITY TEACHERS*

	86-87	87-88	88-89	89-90	Total	PERCENT BY AREA
Elementary						
B	34	17	0	23.5	74.50	96.13
W	0	0	0	0	0	0
O	0	3	0	0	3	3.87
T	34	20	0	23.5	77.50	100.00
Secondary						
B	7	9	0	0	16	47.06
W	7	6	0	0	13	38.23
O	0	3	0	2	5	14.71
T	14	18	0	2	34	100.00
Art						
B	2	2	0	0	4	100.00
W	0	0	0	0	0	
O	0	0	0	0	0	
T	2	2	0	0	4	100.00
Home Economics						
B	0	0	0	0	0	
W	0	0	0	0	1	100.00
O	0	0	0	0	0	
T	0	0	0	0	1	100.00

*Newly appointed Permanent Black, White and Other Minority Teachers were approved April 7 and July 7, 1989 by the Superintendent of Schools and therefore were not reflected in last year's March 15th report to the Court. These permanent appointments are included in this year's report.

iii. NEWLY APPOINTED (cont.)

	86-87	87-88	88-89	89-90	Total	PERCENT BY AREA
Industrial Arts						
B	0	0	0	0	0	
W	0	0	0	0	1	100.00
O	0	0	0	0	0	
T	0	0	0	0	1	100.00
Vocational Education						
B	1	0	0	0	1	100.00
W	0	0	0	0	0	
O	0	0	0	0	0	
T	1	0	0	0	1	100.00
Music						
B	0	4	0	2	6	100.00
W	0	0	0	0	0	
O	0	0	0	0	0	
T	0	4	0	2	6	100.00
Physical Education						
B	3	2	0	0	5	100.00
W	0	0	0	0	0	
O	0	0	0	0	0	
T	3	2	0	0	5	100.00
Bilingual Education						
B	1	4	0	0	5	12.19
W	3	9	0	2	14	34.15
O	1	9	0	12	22	53.66
T	5	22	0	14	41	100.00

iii. NEWLY APPOINTED (cont.)

	86-87	87-88	88-89	89-90	Total	PERCENT BY AREA
Special Education						
B	11	8	0	4	23	32.86
W	11	23	0	5	39	55.71
O	3	4	0	1	8	11.43
T	25	35	0	10	70	100.00
GRAND TOTALS						
B	59	46	0	29.5	134.5	56.39
W	21	38	0	7	66	27.67
O	4	19	0	15	38	15.93
T	84	103	0	51.5	238.5	100.00

BOSTON PUBLIC SCHOOLS

OFFICE OF PERSONNEL
MANUEL P. MONTEIRO
Senior Manager

CARLO ABRAMS
Unit Leader, Recruitment
JOHN M. CONLEY
Unit Leader, School Services
EDWARD F. KELLEHER
Unit Leader, Records Management
VICTOR A. McINNIS
Unit Leader, Evaluator
ALVIN SHIGGS
Unit Leader, Teacher Placement

MEMORANDUM

TO: Laval S. Wilson, Superintendent
FROM: Manuel P. Monteiro, Senior Manager
DATE: March 15, 1990
SUBJECT: March 15, 1990 Court Report

Please find enclosed the report on the number of white, black and other minority permanent and acting administrators as required to be filed on March 15, 1990 by Order of the United States District Court.

This report was prepared by John M. Conley of the Office of Personnel.

enclosures
cc: John M. Conley, Assistant Manager

CENTRAL ADMINISTRATION

OFFICE OF THE SUPERINTENDENT

1	Superintendent	B
1	Chief of Staff	W(A)
1	Executive Assistant	B

Citywide Student Leadership

1	Junior Coordinator	B(A)

Office of Community Relations

1	Director	0(A)
1	Project Director/Language Assessment	W(A)
2	Language Testers	2O
1	Public Information Officer	W
1	Program Director	O(A)

Student Assignment Plan

2	Directors	1W(A);1B(A)

OFFICE OF DEPUTY SUPERINTENDENT— MANAGEMENT SERVICES

1	Deputy Superintendent	W(A)
1	Executive Administrative Assistant	W(A)
1	Junior Specialist	B

Office of Budget and Planning

1	Director	W
1	Senior Program Director-External Funds	W(A)
2	Junior Coordinators-External Funds	1B(A);1O(A)
1	Assistant Director	B(A)
2	Coordinators	2W(1A)
1	Specialist	W

CENTRAL ADMINISTRATION (cont.)

Office of Personnel

1	Senior Manager	B(A)
1	Assistant Manager	W(A)
4	Unit Leaders	1W;3B(1A)
6	Specialists	1W;3B;2O
1	Senior Coordinator	W

Office of Information Services

1	Director	O
1	Assistant Manager	W
2	Project Leaders	1W;1B
2	Unit Leaders	2W(1A)
1	Analyst	O(A)
2	Junior Analysts	1W;1O(A)
1	Junior Specialist	Vacancy
1	Coordinator	W(A)
1	Senior Coordinator	W(A)
1	Senior Specialist	W(A)
1	Specialist	O(A)

Facilities Management

1	Senior Coordinator	B
1	Director	B
3	Assistant Managers	3W(2A)
1	Senior Structural Engineer	W(A)
2	Senior Specialists	2W(1A)
1	Specialist	W(A)
1	Unit Leader	W
2	Assistant Directors	2W(1A)
6	Area Managers	3W;2B(1A); 1 Vacancy
1	Coordinator	B

CENTRAL ADMINISTRATION (cont.)

School Safety Services

1	Safety Chief	B
1	Senior Safety Coordinator	B
2	Investigative Counselors	1W;1B
1	Coordinator of Investigation and Discipline	W(A)
1	Deputy Safety Chief	W(A)

Department of Food Services

1	Director	B(A)
2	Assistant Directors	1W(A);1B
3	Junior Coordinators	2W(1A);1B(A)

Business Department

1	Business Manager	W
2	Assistant Managers	1W(A);1 Vacancy
2	Coordinators	1W(A);1B(A)
2	Junior Specialists	1W;1B
1	Senior Coordinator	W(A)

OFFICE OF DEPUTY SUPERINTENDENT—
CURRICULUM & INSTRUCTION

1	Deputy Superintendent	B(A)
1	Executive Administrative Assistant	W(A)
1	Director	W(A)
1	Senior Advisor	B(A)
1	Senior Coordinator	W(A)
2	Coordinators	1B(A);1O
2	Project Directors - Title VII	2W(A)
1	Coordinator of Professional Development	W(A)

CENTRAL ADMINISTRATION (cont.)

Department of Chapter I Programs

1	Director	B(A)
2	Assistant Directors	2W(1A)

Office of Instructional Services

1	Program Director-Instr. Services	W(A)
1	Program Director — Reading	W(A)
1	Program Director — Mathematics	W
1	Program Director — Foreign Languages	W
1	Program Director — Media	W(A)
1	Athletic Director	W
1	Senior Advisor — Science	W
2	Coordinators	2W(A)
1	Director	B(A)

Bilingual Department

1	Director	O(A)
4	Bilingual Coordinators	1B(A); 3O(A)
1	Junior Specialist	O
1	Lau Coordinator	W
2	Lau Specialists	1B(A); 1O(A)

Adult Education and Community Services

1	Director	W
1	Coordinating Supervisor	W(A)
1	Junior Coordinator	W(A)

CENTRAL ADMINISTRATION (cont.)

Office of Research and Development

1	Director	W(A)
1	Manager	W(A)
3	Evaluation Specialists	1W;1B;1O
1	Analyst	W(A)
2	Senior Analysts	2W(A)
1	Program Director	O
1	Testing Specialist	W(A)

Office of Citywide Vocational/Education Technology

1	Director	W(A)
1	Coordinator of Urban Retrofit	W
1	Program Director/Occupational Instructional Design	W
1	Bilingual Coordinator	Vacancy
1	Senior Program Director/Computer Education	W
1	Transitional Assistant	Vacancy

Office of Student Support Services

1	Director	W(A)
1	Program Advisor - Interim Services	W(A)
1	Senior Coordinator - Referral and Assessment	W(A)
1	Agent - Referral and Assessment	B(A)
1	Coordinator	W(A)

Pupil Services

1	Senior Advisor	W
1	Chief Supervising Nurse	B

CENTRAL ADMINISTRATION (cont.)

Psychological Services

1	Senior Advisor	B(A)
1	Program Advisor	O(A)

Office of Magnet Schools

1	Director	W(A)
2	Senior Program Directors	1W(A); 1B(A)
1	Coordinator	W(A)

OFFICE OF SPECIAL EDUCATION

1	Senior Officer	W(A)
3	Program Advisors	2W(A); 1O
1	Administrative Assistant	O
1	Senior Coordinator	W

Compliance/Placement

1	Assistant Manager	W(A)
3	Program Advisors - Compliance	2W(A);1B(A)

Contracted Services

1	Associate Manager	W
1	Program Advisor - Contracted Ed. Services	W(A)
1	Specialist	W(A)

OFFICE OF EQUITY

1	Senior Officer	B
1	Senior Administrative Assistant	O
1	Personnel Specialist	B(A)

CENTRAL ADMINISTRATION (cont.)

OFFICE OF GENERAL COUNSEL

1	General Counsel	W(A)
2	Assistant General Counsels	2W
2	Staff Attorneys	1B;1W
1	Coordinator	O

OFFICE OF SENIOR OFFICER—IMPLEMENTATION

1	Senior Officer	B
1	Senior Administrative Assistant	B

Department of Implementation

4	Directors	2W(A);1B(A);1 Vacancy
1	Assistant Director	W
2	Coordinators	1W;1B
8	Specialists	4W(2A);2B(A);2O(1A)
13	Officers	6W(4A);7B(6A)
1	Analyst	O(A)
1	Junior Specialist	W
1	Junior Analyst	O(A)

1.

NUMBER AND PERCENT OF WHITE, BLACK AND OTHER MINORITY TEACHERS IN REGULAR, VOCATIONAL, SPECIAL AND BILINGUAL EDUCATION

YEAR	REGULAR EDUCATION **				VOCATIONAL EDUCATION				SPECIAL EDUCATION **				BILINGUAL EDUCATION **				TOTAL TEACHERS			
	Total Teachers	White Teachers	Black Teachers	Other Teachers	Total Teachers	White Teachers	Black Teachers	Other Teachers	Total Teachers	White Teachers	Black Teachers	Other Teachers	Total Teachers	White Teachers	Black Teachers	Other Teachers	Total Teachers	White Teachers	Black Teachers	Other Teachers
1984 - 1985	2889	2196	633	60	148	99	41	8	935	692	176	67	447	124	72	251	4419	3111	922	386
PERCENTAGES	100	76.01	21.91	2.08	100	66.89	27.70	5.41	100	74.01	18.82	7.17	100	27.74	16.11	56.15	100	70.40	20.86	8.74
1985 - 1986	2954	2167	655	67	150	101	39	10	947	631	184	82	456	127	76	253	4407	3041	954	412
PERCENTAGES	100	74.70	22.95	2.35	100	67.33	26.00	6.67	100	71.91	19.43	8.66	100	27.85	16.67	55.48	100	69.00	21.65	9.35
1986 - 1987	2904	2125	706	73	129	87	32	10	989	724	189	76	468	140	80	248	4490	3076	1007	407
PERCENTAGES	100	73.17	24.31	2.52	100	64.44	24.81	7.75	100	73.21	19.11	7.68	100	29.91	17.09	53.0	100	68.50	22.43	9.07
1987 - 1988	2887.5	2168	719.5	84	88	56	25	7	1080	794	202	84	685	142.5	86	256.5	4740.5	3160.5	1032.5	431.5
PERCENTAGES	100	75.08	24.91	2.91	100	63.64	28.41	7.95	100	73.51	18.64	8.16	100	20.80	12.55	37.39	100	66.69	21.78	9.44
1988 - 1989	2920	2099.5	740	80.5	77	52	20	5	1083.5	790.5	203	90	595	142.5	99.5	253	4575.5	3084.5	1062.5	432.5
PERCENTAGES	100	71.76	25.32	2.64	100	67.53	25.98	6.49	100	72.96	18.73	8.31	100	28.79	20.10	51.11	100	67.33	23.22	9.45
1989 - 1990	2734	1938.5	714.5	81	75	45	24	6	1108	802	215	91	517	143	103.5	270.5	4434	2928.5	1057	448.5
PERCENTAGES	100	70.90	26.14	2.96	100	60	32	8	100	72.38	19.41	8.21	100	27.66	20.02	52.32	100	66.05	23.84	10.11

** INCLUDES THOSE WHO WORK LISTED UNDER "SPECIAL SCHOOLS" AND "ITINERANT TEACHERS"

BEST AVAILABLE COPY

Supreme Court, U.S.
FILED
JUN 19 1991
OFFICE OF THE CLERK

(2)

No. 90-1801

In the Supreme Court of the United States

October Term, 1990

BOSTON TEACHER UNION LOCAL 66,
Petitioner,

v.

TALLULAH MORGAN, et al.,
Plaintiffs-Respondents,
and
DANIEL R. BURKE, et al.,
Defendants-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

JOINT BRIEF IN OPPOSITION

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Morgan v. Kerrigan, 388 F. Supp. 581 (1975) 2

Morgan v. Kerrigan, 509 F.2d 599 (1st Cir. 1975) 1

Morgan v. Nucci, 831 F.2d 313 (1st Cir. 1987) 2

Morgan v. O'Bryant, 671 F.2d 23 (1st Cir. 1982) 6

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Statement of the Case

Boston School officials engaged in a multi-faceted program of racial discrimination, including discrimination in the hiring of teachers and the selection of administrators.[1] As a consequence, in the early 1970's the system's faculty was only 5.4% black and its administrators only 3.5% black.[2] Court-ordered remedies for these violations began in the summer of 1974 (interim relief, faculty);[3] and continued with the principal faculty remedy in

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[1] Morgan v. Hennigan, 379 F. Supp. 410, 463-66, 482 (1974), aff'd, 509 F. 2d 580, 596-98 (1st Cir. 1975), cert. denied, 421 U.S. 963 (1975).

[2] Morgan, supra, 379 F. Supp. at 463.

[3] Morgan v. Kerrigan, 509 F.2d 599, 600 (1st Cir. 1975).

1975,[4] as well as the "Order for Desegregation of Administrative Staff" in 1976. The remedies were adjusted from time to time to address additional problems, or imperfect compliance.[5]

In 1990, the district court considered the entry of a final judgment. Pet. App. at 6a.[6] In written submissions and at a hearing, several parties made, inter alia, two points. First, the school system had yet to achieve compliance with seven elements of the remedies addressing staff issues. Pet. App. at 5a-6a. Second. As a result of the hiring violations noted above and

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[4] Morgan v. Kerrigan, 388 F. Supp. 581 (1975).

[5] Morgan v. Nucci, 831 F.2d 313, 327-28, 330 n.26 (1st Cir. 1987).

[6] As the petition notes (at 12-13), the district court has been sensitive to the need to diminish the scope of its jurisdiction.

imperfect compliance with the resulting remedial orders, the pattern of seniority among teachers and administrators was racially skewed; i.e., on average, white staff had greater seniority than black and other minority staff. Data supporting this thesis was offered. Pet. App. at 8a. It demonstrated "that any substantial layoff of faculty in reverse order of seniority, as provided for in the collective bargaining agreements, would undo in a day what had taken years to accomplish." Id.

The district court following a hearing made several pertinent findings: (1) "Experience shows that complete compliance [with the staff composition remedies] is within reach." Pet. App. at 19a. (2) "[S]eniority under applicable collective bargaining agreements would not now be a racially neutral standard

for likely reductions of faculty and staff." Id. (3) "In our opinion, the need for desegregated faculty still obtains...." Id.

The district court then entered a final judgment including paragraph (3), which prompted the BTU's appeal. Paragraph (3) addresses three matters: achievement of compliance with the staff composition remedies; the standards for any "reduction in force" while the provisions of the paragraph remain in effect; and the ultimate expiration of all orders in the paragraph. Pet. App. at 17a.

On appeal, the Court of Appeals affirmed the district court's judgment, as modified. Pet. App. 14a. The court explicitly rejected BTU's contention that the expiration provision is unworkable. Pet. App. 13a.

Argument

As the Focal Point of the Petition Was Not Raised Below, and for Other Reasons, Review Should Be Denied

This case simply does not present an important question of federal law yet to be resolved by this Court, or conflict in the circuits.

First. There is no issue of excessive intrusion on the prerogatives of state and local school authorities. Compare, Board of Education of Oklahoma City v. Dowell, 111 S.Ct. 630, 637 (1991). These officials, who appeared in the Court of Appeals to support affirmance, appear here to oppose review.

Second. This case presents no issue regarding the permissible scope of affirmative action in layoffs. Pet. at

10, 19. As the Court of Appeals notes (Pet. App. at 11a, n.2), BTU did not raise that issue below.

> "We note that BTU does not challenge the district court's remedial power to override seniority per se. See Wygant, 476 U.S. 267 (raising some question of the appropriateness of race-based layoffs to address any governmental interest). See also Morgan v. O'Bryant, 671 F.2d 23 (1st Cir. 1982) (affirming at an earlier stage in this case the imposition of seniority override layoffs, vigorously challenged at that time by BTU)."

Instead, BTU's focus below was the permissible duration of the district court's authority to address staff composition issues. Pet. App. at 11a.

Third. In Boston, the racially-skewed pattern of seniority is an "effect" or "vestige" of the earlier intentional discrimination in hiring. Accordingly, the district court adopted

the correct rule as to duration of remedies to prevent the carrying forward of earlier intentional discrimination. See Board of Education of Oklahoma City v. Dowell, 111 S.Ct. at 637 ("...a federal court's regulatory control of such systems [should] not extend beyond the time required to remedy the effects of past intentional discrimination"); see also id. at 638 ("whether the vestiges of discrimination had been eliminated to the extent practicable" [footnote omitted]).

Fourth. Two lower courts have found that the expiration procedure is workable. Pet. App. at 13a. Both have had considerable experience with personnel matters in the Boston Public Schools, as the case citations in this brief show. If time leads to doubts on this point, BTU will be free to petition the district court for a modification of

its judgment.

Respectfully submitted,

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For Plaintiffs-Intervenors*

For Plaintiffs*

* The plaintiffs are all black students in the Boston Public Schools and their parents, and the plaintiffs-intervenors all Hispanic students in the system and their parents.

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

(3)

No. 90-1801

In the
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OCTOBER TERM, 1990

BOSTON TEACHERS UNION LOCAL 66,
PETITIONER,

v.

TALLULAH MORGAN, ET AL.,
PLAINTIFFS-RESPONDENTS,

AND

DANIEL R. BURKE, ET AL.,
DEFENDANTS-RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Brief in Opposition to a Petition for Writ of Certiorari of the Boston School Committee and the Superintendent of the Boston Public Schools

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BATEMAN & SLADE, INC BOSTON, MASSACHUSETTS

Question Presented

In an earlier ruling in this case, the First Circuit mandated that remedial affirmative action goals for faculty and staff first adopted in 1975 were to expire when those goals were "adequately reached." In entering a Final Judgment, did the district court properly apply this mandate when it ruled that the affirmative action orders would automatically expire at the point at which a 3% seniority-based layoff would not substantially affect the proportions of minority staff in the teaching force?

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No. 90-1801

In the

Supreme Court of the United States

OCTOBER TERM, 1990

BOSTON TEACHERS UNION LOCAL 66,
PETITIONER,

v.

TALLULAH MORGAN, ET AL.,
PLAINTIFFS-RESPONDENTS,

AND

DANIEL R. BURKE, ET AL.,
DEFENDANTS-RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Brief in Opposition to a Petition for Writ of Certiorari of the Boston School Committee and the Superintendent of the Boston Public Schools

Respondents, Daniel R. Burke, *et al.*,[1] submit this brief in opposition to the Petition for a Writ of Certiorari submitted

[1] The respondents submitting this brief are the School Committee of the City of Boston (of which Daniel R. Burke was the president at the time of the decision challenged here) and the Superintendent of the Boston Public Schools. These respondents are referred to in the decisions below and in this brief as the "School Defendants."

by the petitioner, Boston Teachers Union, Local 66 (the "BTU" or the "Union").

Introduction

It is ironic that the Union invites this Court to use this case to establish principles governing the remedial power of district courts overseeing school desegregation cases. The remedy in this litigation is essentially over. Virtually all of the remedial orders in this case have been vacated. As the curtains close on this case, the BTU asks this Court to reopen them to review remedial decisions made, in some instances, fifteen years ago.

The particular order which the Union challenges came about as the district court attempted to end its jurisdiction in the case, recognizing the imperative stated most recently by this Court in *Board of Education* v. *Dowell*, 111 S. Ct. 630, 637 (1991), that school desegregation decrees "are not intended to operate in perpetuity." In 1987, the First Circuit reminded the district court that the faculty desegregation orders were not permanent orders and directed the district court to vacate those orders when their goals were "adequately reached." *Morgan* v. *Nucci*, 831 F.2d 313, 329 (1st Cir. 1987).

In 1990, the district court, seeking *sua sponte* to enter a final judgment terminating the court's jurisdiction, sought to craft an order which gave specific content to the First Circuit's mandate by articulating a "bright line" test: the affirmative action requirements of the order would terminate automatically when black and other minority staff had achieved sufficient seniority that a seniority-based layoff of 3% of the teaching force (approximately 132 teachers given the number of teachers employed in fiscal 1990 (Petition at 122a)) would not substantially affect the percentage of minority teachers. The First Circuit considered the district court's effort in this regard to constitute a "restrained" "fine-tuning" of its prior mandate and affirmed (Petition at 12a).

This pragmatic attempt to define a meaningful endpoint for a remedy that has operated for more than fifteen years presents no legal issue warranting review by this Court. In particular, this order does not raise the kind of issue regarding voluntary affirmative action plans that this Court addressed in such cases as *Wygant* v. *Jackson Board of Education*, 476 U.S. 267 (1986). To the extent any analogous issues arose in this litigation, they arose in the context of orders that were affirmed long ago and on which the parties to this case have acted in reliance for many years. The practice of this Court has been not to undertake collateral review of such issues. The principle of finality in litigation which this Court has repeatedly and consistently emphasized as vital to the effective functioning of the federal judiciary should counsel this Court to follow its practice in this case.

Statement of the Case

The complaint in this case was filed nearly 20 years ago in 1972. After a lengthy trial, the district court found that virtually every aspect of the Boston Public Schools was infected by racial segregation. Boston was found to operate a "dual" school system. *Morgan* v. *Hennigan*, 379 F. Supp. 410 (D. Mass.), *aff'd sub nom. Morgan* v. *Kerrigan*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

The BTU in its statement of the case points to findings that the School Defendants had segregated teachers and administrators by race, assigning minority teachers to minority schools (Petition at 5-6). The BTU's statement is incomplete, however. The district court found not only that black staff had been segregated into predominantly black schools, but also that minority staff had been unconstitutionally excluded from teach-

ing and administrative positions altogether. *See id.* at 463-66. The district court concluded that this discriminatory pattern of hiring and promotions was a component of the dual school system and thus subject to remediation. The First Circuit affirmed in 1974, and this Court denied review in 1975. *Morgan* v. *Kerrigan*, 509 F.2d 580, 595-98 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

This liability finding established from the outset of this case that the underrepresentation of minority staff constituted part of the "unconstitutional condition." In framing the remedy, the district court required the School Defendants to increase the percentage of black teachers, ultimately to 25%. *Morgan* v. *Kerrigan*, 388 F. Supp. 581, 584-85 (D. Mass. 1975). Again, the First Circuit affirmed and this Court denied review. *Morgan* v. *Kerrigan*, 530 F.2d 431 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976).

Over the next five years, the school system made considerable progress in increasing the percentage of minority teaching and administrative staff, principally by hiring new employees. In 1981, however, a severe budget crisis forced the School Defendants to layoff many teachers. Since the collective bargaining agreement with the BTU provided that layoffs would be conducted in reverse order of seniority, the prospect of a massive reduction in force threatened to wipe out much of the progress toward the affirmative action goals. Accordingly, the district court ordered the School Defendants to conduct any layoff in a way which preserved the then existing percentages of black and other minority staff.[2] The School Defendants pro-

[2] Although the original liability and remedy rulings did not specifically address "other minority" personnel (i.e. Hispanics, Asians, Native Americans and other non-black racial/ethnic minorities), affirmative action requirements for other minorities were incorporated into the remedy in subsequent rulings. The 1981 orders regarding layoffs directed the maintenance of the then existing percentages of other minority staff and the First Circuit affirmed. *Morgan* v. *O'Bryant*, 671 F.2d 23 (1st Cir.), *cert. denied*, 459 U.S. 827 (1982). In 1985,

ceeded to reduce its staff in accordance with that order. The First Circuit affirmed and this Court denied review once again. *Morgan* v. *O'Bryant*, 671 F.2d 23 (1st Cir.), *cert. denied*, 459 U.S. 827 (1982).

In 1985, the district court entered "Final Orders" in which it addressed the affirmative action goals again. Finding that there had been little progress since 1981 toward the achievement of the remedial goals established in 1975, the district court required annual increments in the percentage of non-white staff until the ultimate goals were reached. *Morgan* v. *Nucci*, 620 F. Supp. 214, 216 (D. Mass. 1985). The First Circuit affirmed this aspect of the Final Orders, although it reminded the district court that the faculty orders were not permanent and were to be vacated when the affirmative action goals were "adequately reached." *Morgan* v. *Nucci*, 831 F.2d 313, 329 & n.25 (1st Cir. 1987). The BTU did not petition this Court for review.

In 1990, the district court *sua sponte* sought to conclude the case by entering a Final Judgment that would end the district court's jurisdiction. There was general agreement that virtually all of the vestiges of the dual school system had been eliminated.[3] The only significant exception was in the area of faculty and staff desegregation where the data indicated that some of the goals — principally the goal for black teachers systemwide — had not been attained.

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the district court noted that it had the authority to "enter orders with respect to the employment of Hispanic and other minority faculty no less than its jurisdiction to enter orders regarding the employment of black faculty." *Morgan* v. *Nucci*, 612 F. Supp. 1060, 1062 (D. Mass. 1985). The Union did not appeal from this order. The First Circuit concluded in 1987 that the propriety of a 10% affirmative action goal for other minority staff was part of the law of the case and the BTU did not seek review of that ruling from this Court. *Morgan* v. *Nucci*, 831 F.2d 313, 330 & n.26 (1st Cir. 1987).

[3] The First Circuit ruled that the student assignment remedy had been completed by 1985. *Morgan* v. *Nucci*, 831 F.2d at 317-26.

Given the general mandate of the First Circuit that the affirmative action orders should expire when their goals were "adequately reached," the district court sought to articulate a specific standard to measure that point. The district court considered this issue in the context of another budget crisis in which layoff notices had been sent to hundreds of teachers (Petition at 76a). Since under the law of the case the "unconstitutional condition" to which the affirmative action remedy had been directed was the exclusion of non-white teachers from the ranks of teachers and administrators, a lingering "vestige" of that condition was the disproportionate vulnerability of minority teachers to a seniority-based layoff. Thus, the district court found that in the particular circumstances presented, "seniority under applicable collective bargaining agreements would not now be a racially neutral standard for likely reductions of faculty and staff." (Petition at 19a.)

The pragmatic judgment made by the district court was that when minority staff obtain sufficient seniority that a seniority-based layoff of modest proportions — 3% of the total teaching force — would not substantially affect the percentage of minority staff, the vestiges of the constitutional violation would be sufficiently attenuated to warrant the vacation of the faculty orders. The First Circuit basically affirmed.[4] It viewed the 3% order as an appropriate "fine tuning" of the general requirement that the goals be "adequately reached." (Petition at 12a.)

In September, 1990, acting on a joint motion by plaintiffs and School Defendants, the district court amended the Final Judgment by expressly vacating all remedial orders not expressly set forth in the Final Judgment. *See infra* at 1a.

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[4] The court of appeals modified the district court's ruling in one respect. The district court had articulated the termination point in terms of a layoff of 3% "or more." The First Circuit ordered the words "or more" deleted to avoid the introduction of "uncertainty and open-endedness into an otherwise precise concept." (Petition at 12a.)

Reasons for Denying the Writ

This Court should deny certiorari, first, because the decision below presents no important issue which does not turn on the particular circumstances of this case. The decision of the district court challenged here by the BTU is the corollary of prior rulings that were either unchallenged or affirmed years ago by the First Circuit and that this Court has consistently declined to review. The only issue genuinely presented here is whether the district court properly applied the ruling of the First Circuit four years ago that upon the "adequate" achievement of affirmative action goals, the district court's remedial authority must come to an end. Resolution of this issue involved an exercise of remedial discretion in the particular circumstances of this case. The determination by this Court whether that discretion was abused in this case will furnish little guidance to other federal courts as they bring their school desegregation cases to meaningful conclusions.

Second, the BTU has pointed to no conflict between the decision below and any decision of this Court, of any other Court of Appeals or of the highest court of any state. Although the Union suggests that the First Circuit should have followed particular decisions from other circuits, all of the decisions cited in the Petition are readily distinguishable from and consistent with the decision below.

I. The Petition Does Not Raise an Important, Unsettled Issue of Federal Law.

The BTU invites this Court to view this case as an important test of the extent to which the remedial powers of a district court in a school desegregation case permit the "override" of the seniority provisions of a collective bargaining agreement

between a teachers union and the school board in order to achieve affirmative action goals incorporated into the desegregation remedy. *Cf. Wygant* v. *Jackson Board of Education*, 476 U.S. 267 (1986) (analyzing voluntary abrogation of "last hired, first fired" layoff rule to preserve percentage of minority teachers under Equal Protection principles). This issue was not raised in connection with the order challenged here, nor could it have been raised since the issue was resolved in this litigation years ago.

The principal contours of the affirmative action remedy in this case were established by 1981. By that time, the affirmative action target of 25% black teachers and administrators was established. *See Morgan* v. *Kerrigan*, 388 F. Supp. 581, 584 (D. Mass. 1975), *aff'd*, 530 F.2d 431 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976). By that time as well, the First Circuit had ruled that the requirement that the affirmative action goals be reached superseded the "last hired, first fired" provisions of the collective bargaining agreement between the BTU and the School Defendants. *See Morgan* v. *O'Bryant*, 671 F.2d 23 (1st Cir. 1981), *cert. denied*, 459 U.S. 827 (1982). The First Circuit reaffirmed these remedial principles in 1987. *Morgan* v. *Nucci*, 831 F.2d 313, 327-32 (1st Cir. 1987). Accordingly, the legal underpinnings of the order challenged here were established in a series of decisions dating back to 1975 that were either affirmed or unchallenged on appeal. On those occasions on which the BTU has petitioned this Court for review, this Court has denied certiorari.

It is the practice of this Court not to review legal issues decided in earlier stages of cases before the Court, but to confine its attention to matters raised in the particular judgment or order that is the subject of the petition for certiorari. For example, in *Local 28, Sheet Metal Workers' International Association* v. *EEOC*, 478 U.S. 421 (1986), the defendant-union had been found to have discriminated on the basis of race

in 1975 and was ordered to attain a 29% non-white membership goal by July 1981. This order was affirmed on appeal. The defendant later failed to comply with the order and the district court ordered additional relief. On review of the additional relief, this Court concluded that the validity of the 29% affirmative action goal was not properly before the Court since it had been "established more than a decade ago and was twice affirmed by the Court of Appeals." *Id.* at 441.

The Court in *Local 28* relied on its earlier decision in *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976), a school desegregation case. There, the district court had made findings of intentional discrimination and had directed the implementation of a comprehensive desegregation remedy. Several years later, the school board challenged the district court's refusal to modify its remedial orders in light of subsequent events. Again, this Court ruled that the validity of the underlying remedy, established in earlier phases of the case, was not before the Court. *Id.* at 432.

The principles applied in these cases should control the disposition of the instant petition. As in those cases, the Union is challenging rulings regarding remedies for racial discrimination made during earlier phases of the litigation and either not the subject of challenge on appeal or affirmed by the court of appeals.

The Court in *Local 28* also relied on the well-established line of authority to the effect that a "contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy." 478 U.S. at 441 n.21 (quoting *Maggio* v. *Zeitz*, 333 U.S. 56 (1948)). *See also United States* v. *Rylander*, 460 U.S. 752 (1983); *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967). Thus, if the School Defendants had been charged with contempt of the earlier orders, they would not have been able to defend on the ground that the

underlying orders themselves exceeded the remedial powers of the district court.

Here, the School Defendants have substantially complied with the orders, taking action in reliance thereon for years. In 1981, for example, acting pursuant to the orders then challenged by the BTU, the School Defendants laid off a large number of teachers in such a fashion as to maintain the then existing percentages of black and other minority teachers. *See Morgan* v. *O'Bryant*, 671 F.2d at 24-25. The same logic that would bar the School Defendants from collaterally challenging the validity of the orders that they had failed to obey, should similarly bar another party from challenging the same orders after they had been obeyed.

That logic is the logic of finality. As this Court noted recently in *McCleskey* v. *Zant*, 111 S. Ct. 1454, 1469 (1991), "collateral litigation places a heavy burden on scarce federal judicial resources, and threatens the capacity of the system to resolve primary disputes." By invoking such cases as *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989), and *Wygant*, (Petition at 18), the Union invites this Court to revisit issues that the Union has repeatedly litigated before in this case. Such an invitation should be declined.

Little remains if one puts aside those aspects of the BTU's petition that concern matters not properly before the Court. As the district court sought to enter a final judgment, it confronted two constraints. On the one hand, the school system faced the prospect of teacher layoffs prompted by budget reductions. A seniority-based layoff threatened to wipe out much of the progress toward achievement of the remedial affirmative action goals that had repeatedly been upheld by the First Circuit and to postpone indefinitely ultimate compliance with those goals. The law of the case directed the district court to take steps to prevent this result.

On the other hand, the decisions of both this Court and the First Circuit made it clear that an order perpetuating indefinitely

the percentage requirements was impermissible. The First Circuit had ruled that the orders would remain in effect only until the affirmative action goals had been "adequately reached," and the district court adopted the "3%" test as a pragmatic way to measure "adequacy." It is only this pragmatic judgment, affirmed by the First Circuit, that is properly before this Court.[5]

The challenge to this ruling does not present "an important question of federal law which has not been, but should be, settled by this Court." Supreme Court Rule 17.1(c). This Court has only recently rejected the notion that the district court's remedial authority evaporates at what the First Circuit referred to as the "magic moment when the ratio goals are satisfied for the first time." (Petition at 11a.) In *Board of Education* v. *Dowell*, 111 S. Ct. 630, 637 (1991), this Court noted that "[d]issolving a desegregation decree *after the local authorities have operated in compliance with it for a reasonable period of time* properly recognizes that 'necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination.' " (Emphasis added.) The determination of what is a "reasonable period of time" is inherently a fact-bound determination, dependent upon the particular circumstances of the particular school district. As this Court has observed, "[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann* v. *Board of Education*, 402 U.S. 1, 15 (1971).

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[5] The BTU notes that it disagrees with the district court's refusal to reduce the target percentage for blacks from 25% to slightly under 24%. (Petition at 14.) It makes no serious argument that the circumstances had changed sufficiently to warrant a departure from a goal that had been part of the remedy in this case since 1975, nor did it offer any material evidence that it was impracticable for the School Defendants to continue to strive toward that goal.

The extent to which the Union's challenge turns on facts peculiar to the particular circumstances of this case can be seen most clearly from the Union's principal argument. According to the BTU, the challenged order was improper because it is difficult to pinpoint when the 3% test is satisfied. (Petition at 14-17.) The Union contends that the seniority rules in the collective bargaining agreement are so complex and a layoff can be conducted in so many ways (depending, for example, on the program area or grade level targeted for reduction) that "it is impossible to envision the practical effect of a hypothetical layoff" on the percentage of minority staff. (Petition at 15.) Notwithstanding this impossibility, the BTU also claims that because of the lack of uniform distribution of minority staff it cannot envision an actual 3% layoff which does not alter the percentage of black and other minority teachers.

The First Circuit rejected this argument. Since 1981, the orders in this case have required layoffs to be conducted so as to preserve the then existing percentages of black and other minority staff. The First Circuit correctly concluded that predicting the effect of a seniority-based 3% layoff poses no greater challenge than the management of layoffs for the past decade under the "maintenance" model first adopted in 1981.

Even if the BTU were correct, however, that the 3% order is difficult to apply, the clarification or modification of such an order is surely a matter for the trial court to resolve in the first instance in the factual setting in which the order is to be applied. If the order is applied in practice to defer the termination point indefinitely, then the BTU will have an opportunity to seek review on a record that would permit a reviewing court to evaluate the application of the order. It makes no sense, however, for this Court to attempt to predict how the order will

be applied in practice at some point in the future under circumstances that have not yet even materialized.[6]

The BTU urges this Court to review an order largely on the basis of its speculation that the order will be misapplied. This case is plainly not a suitable one for this Court's discretionary review. It is fact-intensive and, at best, premature. Certiorari should be denied.

II. The Decision of the First Circuit Challenged Here Does Not Conflict with Any Decision of This Court or of Any Circuit Court.

The BTU claims that the challenged order contemplates the maintenance of a particular degree of racial balance after the achievement of "unitary status," and that this aspect of the order conflicts with other circuit court decisions which are said to require the termination of remedial jurisdiction immediately upon the achievement of "unitary status." The BTU's claims in this regard are spurious. Neither this Court nor the other circuits have adopted a "magic moment" theory of desegregation remedies whereby remedial orders lose their validity at the first moment of compliance. On the contrary, the consistent view of the circuit courts in desegregation cases is that a school system may be required to maintain desegregated conditions for a period of time to ensure the stability of the unitary system. *See, e.g., Pitts* v. *Freeman*, 887 F.2d 1438, 1445-46 (11th Cir. 1989), *cert. granted*, 59 U.S.L.W. 3561 (Feb. 19, 1991);[7]

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[6] Since the systemwide percentage of black teachers still falls short of the 25% goal, the 3% test is not yet even applicable.

[7] The Eleventh Circuit in *Pitts* not only followed the long established practice in the Fifth and Eleventh Circuits to require the maintenance of a desegregated system for a period of at least three years, but also rejected the notion that discrete remedial areas such as student assignments or faculty desegregation could become "unitary" while other areas remained subject to further remedi-

Quarles v. *Oxford Municipal Separate School District*, 868 F.2d 750, 752 (5th Cir. 1989); *Ross* v. *Houston Independent School District*, 699 F.2d 218, 227 (5th Cir. 1983). This Court in *Dowell* recognized the general applicability of this approach by expressing its approval of "[d]issolving a desegregation decree *after the local authorities have operated in compliance with it for a reasonable period of time*." 111 S. Ct. at 637 (emphasis added).

The BTU argues that these decisions require the maintenance of desegregation for a period *before* a finding of unitary status, not afterwards. The union misreads these cases, however. The procedure contemplated by those decisions is one of monitoring the achievement of the remedial goals to ensure that the elimination of the vestiges of segregation is not spurious or evanescent.

For example, in *Ross*, the district court found in 1980 that the school district was "unitary." 699 F.2d at 223. In connection with that finding, however, the district court retained jurisdiction for three more years and required the filing of reports in accordance with the procedures first set forth in *Youngblood* v. *Board of Public School Instruction*, 448 F.2d 770 (5th Cir. 1971) (*per curiam*). *Id.* at 227. The Fifth Circuit affirmed. *Accord*, *United States* v. *Overton*, 834 F.2d 1171, 1175 & n.12 (5th Cir. 1987).

Similarly, in *Pitts*, the Eleventh Circuit expressed the requirement for dismissal of the case in terms of maintaining

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ation. *See* 887 F.2d at 1446-47. It was on the latter aspect of the *Pitts* decision, as well as the requirement that the system remedy segregation resulting from demographic changes, that the school district in *Pitts* sought review from this Court.

This case does not present the issues on which review was sought in *Pitts*. The First Circuit expressly adopted the "incremental" approach to the completion of desegregation remedies in 1987. *Morgan* v. *Nucci*, 831 F.2d at 318-19. Indeed, the *Pitts* court expressly disagreed with *Morgan*, thus creating a conflict that likely influenced this Court's decision to review *Pitts*. Nothing in the present case turns on the resolution of this issue.

the *desegration* conditions for a period of years. 887 F.2d at 1446. In *Quarles*, the district court held in 1972 that the implementation of a remedial plan had eliminated all vestiges of segregation. *See* 868 F.2d at 752. The question whether sufficient time had passed arose in the context of a motion in 1987 by the school district to vacate the remedial order and dismiss the case.

In each of these cases, the issue was whether the school system had maintained a "unitary" system, i.e. a system that had eliminated the vestiges of discrimination, for a sufficient period to warrant not a finding of "unitary status" but rather dismissal of the litigation altogether. The mandate to the district court during the interim period is not further remediation but rather the retention of jurisdiction and the receipt of status reports. *E.g.*, *Youngblood*, 448 F.2d at 771; *Ross*, 699 F.2d at 227.

A further indication that the "maintenance" period comes after the achievement of the remedial goals is that at the end of the period the district court must give the plaintiffs an opportunity to show why the case should not be dismissed. *E.g.*, *Youngblood*, 448 F.2d at 771; *Ross*, 699 F.2d at 227; *Quarles*, 868 F.2d at 752. Before the completion of a desegregation remedy, this Court has made it quite clear that it is the defendant school district's burden to show that unitary status has been achieved. *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526, 538 (1979). The shifting of the burden to the plaintiff to demonstrate why the case should not be dismissed shows that the period during which jurisdiction is to be retained is "post-unitariness."[8]

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[8] The Fourth Circuit's decision in *Vaughns* v. *Board of Educ.*, 758 F.2d 983 (4th Cir. 1985), is not to the contrary. Although the Court observed that once "unitary status" is achieved, the district court may not order "*further* relief to counteract resegregation that does not result from the school system's intentionally discriminatory acts," *id.* at 988 (emphasis added), it had no occasion to consider whether some period of maintenance should be required after the

It follows from the foregoing that the decision of the First Circuit approving a relatively brief period of maintenance before the faculty and staff desegregation orders expire by their terms is entirely consistent with the practice in other circuits, a practice which this Court recognized in its recent decision in *Dowell*. The Union's claim of a conflict among the circuit courts on this subject is entirely fanciful.[9]

achievement of unitary status. The principal holding of *Vaughns* was that the school board had not demonstrated that the remedy was complete.

The Fourth Circuit's approach to the termination of desegregation decrees is consistent with that of the Fifth and Eleventh Circuits. *Riddick* v. *School Board*, 784 F.2d 521, 530 (4th Cir.), *cert. denied*, 479 U.S. 938 (1986) (district court to retain jurisdiction "to make certain" the remedial goals had been accomplished).

[9] The other conflicts suggested by the BTU are no more substantial. In *Oliver* v. *Kalamazoo Bd. of Educ.*, 706 F.2d 757 (6th Cir. 1983). The Sixth Circuit vacated an affirmative action order entered nine years after the original liability determination abrogated a collectively bargained seniority provision without a finding that such an order was necessary to vindicate the rights of the plaintiffs. In this case, the faculty desegregation order, including the 25% black goal, was part of the original remedy. See also *Arthur* v. *Nyquist*, 712 F.2d 816 (2d Cir. 1983), *cert. denied*, 466 U.S. 936 (1984).

Oliver might arguably be relevant if the propriety of the faculty desegregation orders in this case were properly before this Court, although even if that were the case, the *Oliver* court cited the First Circuit's decision upholding the remedy in this case without any suggestion that it disagreed with that decision. See 706 F.2d at 762. As the earlier discussion has demonstrated, however, this Court faces no question regarding the propriety of the faculty desegregation orders as an original matter. Accordingly, *Oliver* is not relevant.

The BTU's citation of of *Keyes* v. *School Dist. No. 1*, 895 F.2d 659, 665 (10th Cir. 1990) (Petition at 24), adds nothing to its argument. Nowhere in that opinion is there any suggestion that the kind of "fine-tuning" approved by the First Circuit in this case is inconsistent with the remedial principles applied in desegregation cases. Indeed, the Tenth Circuit approved a order requiring the school district to employ an affirmative action plan, with "yearly timetables and a reasonable target date for the attainment of the affirmative action goals." *Id.* at 668-69 & n.5.

Conclusion

For the foregoing reasons, the BTU's petition for a writ of certiorari should be denied.

Respectfully submitted,

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Appendix

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

TALLULAH MORGAN, ET AL.,
Plaintiffs,

v. CIVIL ACTION NO. 72-911-G

DANIEL R. BURKE, ET AL.,
Defendants.

AMENDED FINAL JUDGMENT

GARRITY, J.

After consideration of the Joint motion for Modification of Final Judgment submitted by Plaintiffs and School Defendants, it is ORDERED and ADJUDGED that the Final Judgment of this Court dated May 31, 1990 is hereby amended by adding after paragraph 4 the following:

Reports on Staffing

(5) shall continue the October and March reports on staffing so long as paragraph (3) is in effect, and shall include in the March report data showing the make-up of the faculties at the three examination schools;

Vacation of Outside Orders

(6) all orders previously entered in this action and not specifically set forth in this Final Judgment are hereby VACATED.

/s/ W. Arthur Garrity, Jr.
United States District Judge
9/19/90

Nos. 90-1801

Supreme Court, U.S.
FILED
JUN 24 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

October Term, 1990

BOSTON TEACHERS UNION, LOCAL 66

Petitioners,

v

TALLULAH MORGAN, et al.

Plaintiffs-Respondents,

and

DANIEL R. BURKE, et al.

Defendants-Respondents

On Petition for a Writ of
Certiorari to the United States Court of Appeals
for the First Circuit

RESPONDENT MASSACHUSETTS BOARD OF EDUCATION'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Where the courts below have determined as a matter of fact that the vestiges of discrimination remain and unitariness has not been achieved in the Boston public schools, does this case present the question of whether a federal court may retain jurisdiction for any period of time after unitariness has been achieved?

2. Where unitariness has not yet been achieved, the Final Judgment on its face provides for its own termination, and petitioner has introduced no facts in the District Court to support its claim that the order in effect is permanent, does this case properly present the question of whether the Final Judgment is permanent?

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The respondent Massachusetts Board of Education respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion and order of the United States Court of Appeals for the First Circuit in this case. That opinion and order is reported at 926 F.2d 86.

STATEMENT OF THE CASE

This case commenced in 1972. The plaintiffs, a class of black Boston public school children and their parents, sued certain defendants including the Boston School Committee, its individual members, and the Superintendent of Schools ("the school defendants"). The present petitioner Boston Teachers Union Local 66, AFT, AFL-CIO ("BTU") subsequently intervened in the United States District Court for

purposes of addressing faculty and staff issues. Morgan v. Kerrigan, 509 F.2d 599, 600 (1st. Cir. 1975). The plaintiffs alleged that they were denied equal protection of the laws and equality of educational opportunity, in violation of U.S. Const. amend. XIII and XIV, and 42 U.S.C. §§1981, 1982 and 2000.

In 1974, the District Court made extensive findings, concluding, inter alia, that the school defendants had knowingly violated the constitutional rights of public school students by engaging in a long-standing pattern of racial discrimination in the recruitment, employment, assignment, transfer and promotion of teachers and administrators. Morgan v. Hennigan, 379

F. Supp. 410, 456-466 (D. Mass. 1974). In affirming these findings, the United States Court of Appeals for the First Circuit stated that Boston's staffing practices

> . . . further combined to buttress the segregated nature of the school system . . . thereby denying to (black) students equal educational opportunity to which they are entitled . . . . Faculty segregation . . . is a significant element in a racially discriminatory system which must be . . . eliminated root and branch.

Morgan v. Kerrigan, 509 F.2d 580, 597-598 (1st Cir. 1974), cert. den. 421 U.S. 963 (1975) (citations omitted).

Having found liability, the District Court proceeded to issue a series of remedial orders throughout the next decade. These orders were designed to "eliminate every form of racial segregation in the Public Schools of

Boston, including all consequences and vestiges of segregation previously practiced by the defendants." Morgan v. Hennigan, supra, 379 F.Supp. at 484. The BTU has unsuccessfully challenged virtually every order directed toward faculty desegregation. Indeed, as described below, this Court has already denied two petitions for writ of certiorari filed by the current petitioner BTU in connection with faculty desegregation orders issued in this case.

The first (interim) faculty desegregation orders, entered in July, 1974, mandated a hiring rate of one new black teacher for each new white teacher hired, and directed proportionate assignment of black faculty throughout the school system. The Court of

Appeals upheld these orders against a BTU challenge, emphasizing that the orders were intended to protect the rights of black Boston Public School children. Morgan v. Kerrigan, supra, 509 F.2d at 600-601.

In 1975, the District Court entered new remedial orders for faculty desegregation, requiring, among other things, a continuation of one-to-one hiring until 20% of the faculty was black, with additional obligations to continue until 25% of the faculty was black. Morgan v. Kerrigan, 388 F.Supp. 581 (D.Mass. 1975). The BTU also appealed this order, specifically questioning the propriety of the 20% hiring goal. The appellate court again affirmed the District Court's order, specifically finding that the 20% hiring

goal was not an abuse of discretion. This Court then denied BTU's petition for writ of certiorari. Morgan v. Kerrigan, 530 F.2d 431, 434 (1st Cir. 1976), cert. den. sub nom, McDonough v. Morgan, 426 U.S. 935 (1976).

In the Spring of 1981, when the percentage of black teachers was 19.09 percent, massive layoffs were contemplated by school officials in response to funding constraints. Recognizing that recent gains in staff desegregation would be erased if layoffs proceeded in accordance with the seniority provisions in applicable contracts, the District Court entered conditional orders requiring that layoffs, if they occurred, be conducted so as to preserve current minority staff percentages. The BTU appealed this

order and the Court of Appeals again affirmed, applying the standards articulated in Milliken v. Bradley, 433 U.S. 267, 280-281 (1977). This Court again denied BTU's petition for certiorari. Morgan v. O'Bryant, 671 F.2d 23 (1st Cir. 1982), cert. den., 459 U.S. 881 (1982).

By 1985, the District Court, which had already withdrawn jurisdiction over specific areas of the remedy in which unitary status had been achieved, chose to remove the remaining aspects of the litigation from its active docket through the issuance of Final Orders. Regarding faculty and staff, the District Court included a paragraph in its Final Orders that reiterated the 25% goal for black employees and articulated a 10% goal for other minority

employees. It called for the maintenance as well as the achievement of these goals, and introduced annual rates of increase for black and other minority teachers and administrators until the specific goals were met. In a subsequent modification of this paragraph, specific staffing levels for black and other minority faculty at each of the three examination schools operated by the Boston Public Schools were introduced. The BTU appealed yet again, raising a variety of contentions, all of which were rejected by the Court of Appeals. Morgan v. Nucci, 831 F.2d 313, 327-332 (1st Cir. 1987). In its opinion, the Court of Appeals stressed a court's obligation in a desegregation case to combat "the lingering effects of past discrimination" and to require

"complete compliance with all outstanding faculty and staff orders" prior to a declaration of unitary status in the area of staffing. Id. at 329 n. 25.

On May 31, 1991, the District Court entered a Final Judgment. Prior to entering the judgment, the District Court considered the comments of all the parties, including those of the Boston school defendants and the BTU. The District Court found that further protection in the area of faculty and staff desegregation was necessary, particularly in light of likely reductions in force threatened by another anticipated budget shortfall. (Pet. App. 19a). The Final Judgment maintains the previously targeted percentages and requirements for annual

percentage increases in faculty and staff. Regarding prospective layoffs and termination of the order, the Final Judgment provides that:

> . . . notwithstanding applicable collective bargaining agreements, [school defendants] shall conduct any reduction in force (RIF) of either faculty or staff in such a manner as to preserve after such RIF substantially the same racial-ethnic proportions of faculty and staff as existed immediately before it; provided that the orders in this paragraph shall expire when black and other minority faculty and staff shall have attained seniority to such an extent that, were a RIF to occur based upon the seniority provisions of applicable collective bargaining agreements reducing faculty and staff by 3% or more, the racial/ethnic proportions of faculty and staff after such a RIF would, in the written opinion of the Superintendent of Schools, be substantially the same as those existing before it.

When the BTU appealed yet again, the Court of Appeals again affirmed, after striking the phrase "or more" following the figure "3%". (Pet. App. 14a).

REASONS FOR DENYING THE WRIT

The Court of Appeals' decision is correct and is wholly consistent with the decisions of this Court. There is no conflict between the circuits that this Court must resolve. Since the petitioner does not challenge the factual finding that "unitariness ha[s] not yet been achieved" (Pet. App. 7a), and the Court of Appeals decision simply applies existing precedent with respect to the eradication of the vestiges of past discrimination, there is no pressing issue of national importance that is presented by this case or that requires this Court's attention. The Court should therefore deny the writ. See Rule 10, Rules of the Supreme Court of the United States.

I. The Court of Appeals Decision Is Fully Consistent With the Decisions of this Court.

Petitioner asserts that the issue presented in this case is whether the courts below exceeded their judicial authority. Yet, petitioner can and does not point to any decision of this Court with which the Court of Appeals decision is inconsistent.

a. A Federal Court Properly Retains Jurisdiction Where, As Here, There Remain Vestiges Of Discrimination And Unitary Status Has Not Been Achieved.

While petitioner cites many decisions of this Court concerning the proper scope of a federal court's remedial power in school desegregation cases (Pet. 10-12), it does not contend that the Court of Appeals decision is inconsistent with any of them, nor could it. The factual finding on the record before this Court is that the vestiges of discrimination remain, and that

unitariness has not been achieved in the Boston Public Schools. (Pet. App. 7a). The Court of Appeals reached this conclusion by measuring the school system's progress against the numerical goals set forth in the 1985 Final Orders and found significant shortfalls. (Pet. App. 6a-7a).[1/] Whether or not the Final Judgment "redefine[d] the concept of unitariness" (Pet. 13) by incorporating

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1/ The shortfalls are detailed in the opinion of the Court of Appeals. (Pet. App. 5a-7a). The finding that the shortfalls were significant was not based solely, as petitioner would have it (Pet. 14), on a finding that the 25% systemwide goal for black teachers had not been met. Rather, the Court of Appeals found that shortfalls appeared in six of the twelve staffing catagories covered by the order: black faculty systemwide, other minority principals and headmasters, black faculty at two of three examination schools, and other minority faculty at all three examination schools. (Pet. App. 5a-6a).

a layoff provision, the fact remains that even under the 1985 standard, unitariness has not been achieved. Hence, this case does not present the issue of whether the District Court could retain jurisidiction over this case if unitariness had in fact been achieved.

The decision of the Court of Appeals is therefore fully consistent with this Court's recent reaffirmation of the principle that the federal courts' remedial authority extends to eliminating conditions that violate the Constitution "or flow from such a violation." Board of Education Oklahoma City Public Schools v. Dowell, 111 S.Ct. 630, 637 (1991).[2/]

2/ Petitioner baldly asserts at various places in the Petition that the "authorities are no longer operating a dual school system and have eliminated

(footnote continued)

b. The Final Judgment Is Not An Impermissible Permanent Order.

The order below does not construct permanent racial ratios.[3/] On its face the order provides for its expiration. (Pet. App. 17a). While

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(footnote continued)

its vestiges." (Pet. 10, 20). This completely ignores the factual findings below. (Pet. App. 7a). In addition, petitioner does not seek certiorari on the question of whether the contrary factual findings of the courts below were clearly erroneous, and points to no basis for a conclusion that the factual findings are clearly erroneous. Nor would such a question justify the granting of a petition. Rule 10, Rules of the Supreme Court.

3/ Petitioner relies on dicta in a footnote in Milliken v. Bradley, 433 U.S. 267, 280 n. 14 (1977) to support the argument that such an order would violate the law. There, however, the Court was referring to a hypothetical situation in which there was no finding of intentional discrimination, but a finding of "racial imbalance" alone. Id. This is not the situation presented here. A finding of intentional discrimination is the predicate for this entire case.

petitioner may not approve of the standard used by the District Court to decide when the order shall expire, that is quite different from the order being permanent. Certainly this Court has never held that it is in excess of a federal court's authority to establish a standard for unitariness that would ensure more than momentary compliance with specific numerical goals. Otherwise, as the Appeals Court recognized, "the entire exercize, into which so many had invested so much, could well prove to be a painful charade." (Pet. App. 11a). Indeed, Dowell states that a federal court may properly require compliance with its orders "for a reasonable period of time . . . to remedy the effects of past intentional discrimination." Board of

Education Oklahoma City Public Schools v. Dowell, 111 S.Ct. at 637. In this case, once the standard set forth in the order for expiration is met, by definition the vestiges of past discrimination are deemed to be eliminated, and the order by its own language shall terminate.[4/]

Petitioner also argues that the standard for termination is illusory, and inadministrable due to the complexities of the collective bargaining agreement. (Pet. 14-15). The Court of Appeals correctly rejected this "highly technical" argument as follows:

4/ The Court of Appeals expressed its appreciation for non-permanence as early as 1975 when it identified the standard in the remedial order as providing "a built-in terminus for court responsibility". Morgan v. Kerrigan, supra, 530 F.2d at 434.

> We merely observe that since 1981 layoffs have been accomplished in such a way as to preserve existing percentages, that presumably predicting the effect of a 3% layoff would pose no greater challenge, and that the School Defendants, who must be relied upon to implement the order, have raised no objection."

(Pet. App.13a)[5/]

c. The Question of Whether The Termination Provisions Of The Final Judgment Are Workable As A Practical Matter Is Not Ripe For Review.

The record is bare of any facts to support the petitioner's claim that the 3% layoff mechanism is unworkable. This issue was never even raised before the District Court. (Pet. App. 67a-71a).

However, even if the mechanism adopted by the District Court for

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5/ No party, including Boston Public School officials, argued to the District Court that the specific percentage goals were inappropriate or impossible to achieve; and the District Court specifically found that complete compliance was in reach. (Pet. App. 7a).

termination of its power creates a situation where jurisdiction will continue after unitariness has been reached, the time and place to raise that matter is before the District Court once the numerical goals have been achieved and there has been some effort to apply the District Court's termination formula. It is simply premature to raise the issue now.

II. There Is No Conflict Between the Lower Court Decision and the Decisions of Other Courts of Appeals.

Petitioner argues that the decision below creates a split in the circuits on the question of whether federal court jurisdiction can continue "once unitariness is achieved." (Pet. 20). But as stated above, the First Circuit and the District Court found that unitariness has not been achieved in

this case. Hence, the issue on which petitioner contends there is a conflict in the circuits is simply not raised in this case; and, certainly, the decision below creates no such conflict.

Even assuming, however, that technical compliance with the standards for measuring unitariness had been achieved, it would be perfectly consistent with the decisions of other Courts of Appeals for the District Court to retain jurisdiction for a period of time to ensure that compliance is not an aberrational or momentary phenomenon. See Quarles v. Oxford Mun. Separate School Dist., 868 F.2d 750, 752 (5th Cir. 1989); Ross v. Houston Indep. School Dist., 699 F.2d 218, 227 (5th Cir. 1983); Pitts v. Freeman, 887 F.2d 1438, 1446 n.9 (11th Cir. 1989). As the

Court of Appeals found the District Court's order does no more than than that which has been upheld by these other Courts of Appeals. (A. 10a-12a),.

The core of petitioner's complaint appears to be that the First Circuit's affirmance of the District Court's most recent decision is somehow in conflict with its own prior decisions in this very case. However, as the Court of Appeals held, the most recent District Court order is not at all inconsistent with or different from its earlier orders setting standards for judging when unitariness and compliance would be achieved. (Pet. App. 10a -12a). Rather, the most recent orders represent a "further definition" and "fine tuning" of the earlier orders. (Id.).

As the Court of Appeals found, petitioner's arguments would create "a trap or straitjacket for a court if it could not interpret prior general concepts in light of later events." (Pet. App. 12a). Neither the law of this Court, nor of any United States Court of Appeals, prevent a federal court from interpreting and clarifying its own orders in subsequent proceedings.

Even if there were a conflict between two decisions of the First Circuit Court of Appeals, however, that would not warrant the granting of the petition. Rule 10(a) contemplates only situations in which there is a conflict with the decision of another United States Court of Appeals.

CONCLUSION

For all the foregoing reasons, the

petition for writ of certiorari should be denied.

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